APPENDIX A

UNITED STATES COURT OF APPEALS, FEDERAL CIRCUIT

TURTLE ISLAND RESTORATION NETWORK, TODD STEINER, THE AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, THE HUMANE SOCIETY OF THE UNITED STATES, AND THE SIERRA CLUB,

Plaintiffs-Appellants,

v.

DONALD L. EVANS, SECRETARY OF COMMERCE, COLIN L. POWELL, SECRETARY OF STATE, PAUL H. O'NEILL, SECRETARY OF THE TREASURY, DAVID B. SANDLAW, ASSISTANT SECRETARY OF STATE FOR THE BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, PENELOPE D. DALTON, ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL MARINE FISHERIES SERVICE, AND ALAN P. LARSON, UNDER SECRETARY OF STATE FOR ECONOMIC, BUSINESS AND AGRICULTURAL AFFAIRS,

Defendants-Cross Appellants,

and

NATIONAL FISHERIES INSTITUTE, INC.,

Defendant-Cross Appellant.

Nos. 00-1569, 00-1581 and 00-1582

DECIDED: March 21, 2002

[284 F.3d 1282]

Before NEWMAN, CLEVENGER, and SCHALL, Circuit Judges.

CLEVENGER, Circuit Judge.

This case concerns the implementation of section 609(b) of Public Law 101-162, which prohibits the import of shrimp which have been harvested with fishing technology that may harm sea turtles. Despite having ruled that the government's regulations implementing section 609(b) were not in accordance with that statute, the Court of International Trade refused to enter an injunction directing the government to comply with the law. Plaintiffs, a coalition of environmental organizations and concerned citizens ("Turtle Island"), appeal the Court of International Trade's decision to withhold both an injunction and attorney fees under the Equal Access to Justice Act. Defendants, government officials charged with implementing section 609(b), cross-appeal the judgment of the Court of International Trade that their regulations violate the statute. We hold that the government's regulations are a permissible implementation of the statute and that Turtle Island is not entitled to injunctive relief or attorney fees.

BACKGROUND

Since 1987, United States regulations have required that shrimp trawlers generally install turtle excluder devices ("TEDs") when operating in United States waters where sea turtles are to be found. 50 C.F.R. §§ 223.206, 223.207 (2001). Shrimpers sweep many other denizens of the sea ("bycatch") into their nets when they trawl for shrimp. But unlike fish or shrimp, sea turtles are reptiles and must breathe air. While sea turtles can remain submerged for up to 90 minutes at a time, trawl nets typically are deployed for periods longer than 90 minutes before being hauled up. Sea turtles will drown if they are caught in shrimp nets and held underwater for long periods of time. When fitted into trawl nets, TEDs prevent sea turtles from being retained in the nets--typically by means of a metal grid barring entry to the closed end of the net. The grid bars are spaced so as to let shrimp pass through the grid into the closed end of the net,

but the much larger sea turtles cannot pass through and are instead directed out an "escape hatch" above or below the grid.

The domestic shrimp industry strongly opposed the imposition of TED requirements in United States waters. *See, e.g., State of Louisiana, ex rel. Guste v. Verity*, 853 F.2d 322 (5th Cir.1988). However, the case before us concerns not domestic regulations, but arises instead from nearly a decade's worth of litigation over the enforcement of a statute designed to impose TEDs on shrimping vessels of foreign nations: The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub.L. 101-162, Title VI, § 609, 103 Stat. 1037 (1989) (codified at 16 U.S.C. § 1537 note (2000)) ("section 609").

The full text of section 609 is as follows:

(a) The Secretary of State, in consultation with the Secretary of Commerce, shall, with respect to those species of *1285 sea turtles the conservation of which is the subject of regulations promulgated by the Secretary of Commerce on June 29, 1987--

(1) initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations for the protection and conservation of such species of sea turtles;

(2) initiate negotiations as soon as possible with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which, as determined by the Secretary of Commerce, may affect adversely such species of sea turtles, for the purpose of entering into bilateral and multilateral treaties with such countries to protect such species of sea turtles;

(3) encourage such other agreements to promote the purposes of this section with other nations for the protection of specific ocean and land regions which are of special

significance to the health and stability of such species of sea turtles;

(4) initiate the amendment of any existing international treaty for the protection and conservation of such species of sea turtles to which the United States is a party in order to make such treaty consistent with the purposes and policies of this section; and

(5) provide to the Congress by not later than one year after the date of enactment of this section (Nov. 21, 1989)--

(A) a list of each nation which conducts commercial shrimp fishing operations within the geographic range of distribution of such sea turtles;

(B) a list of each nation which conducts commercial shrimp fishing operations which may affect adversely such species of sea turtles; and

(C) a full report on--

(i) the results of his efforts under this section; and

(ii) the status of measures taken by each nation listed pursuant to paragraph (A) or (B) to protect and conserve such sea turtles.

(b)(1) In General.--The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles shall be prohibited not later than May 1, 1991, except as provided in paragraph (2).

(2) Certification Procedure.--The ban on importation of shrimp or products from shrimp pursuant to paragraph (1) shall not apply if the President shall determine and certify to the Congress not later than May 1, 1991, and annually thereafter that--

(A) the government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and

(B) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or

(C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

Section 609 is divided into two parts, (a) and (b). Part (a) directs the Secretary of *1286 State to initiate international negotiations with the aim of protecting those species of sea turtles protected by the domestic TED requirements.[1] Part (b)(1) restricts the importation of shrimp which have been harvested in a manner that may endanger those species of sea turtles. Part (b)(2) establishes a certification procedure,[2] by which nations are exempted from the ban either if they have adopted regulatory measures reducing the incidental catch of sea turtles (e.g., a requirement that their shrimp fleets be equipped with TEDs), or if their operations do not pose any threat to sea turtles (e.g., no endangered turtles inhabit the waters fished by that nation).

This case requires us to decide whether section 609(b)(2)'s certification procedure is the only way a foreign nation may comply with section 609(b). Under the State Department's current regulations (*Revised Guidelines for the Implementation of Section 609 of Public Law 101- 162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*, 64 Fed.Reg. 36,946 (July 8, 1999) ("the 1999 Guidelines")), shrimp may be imported into the United

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[1] These species are the loggerhead (*Caretta caretta*), Kemp's ridley (*Lepidochelys kempi*), green (*Chelonia mydas*), leatherback (*Dermochelys coriacea*) and hawksbill (*Erermochelys imbricata*).

[2] The President has delegated his authority to certify nations under 609(b)(2) to the Secretary of State. *Delegation of Authority Regarding Certification of Countries Exporting Shrimp to the United States, 56 Fed.Reg. 357 (Jan. 4, 1991).*

States under one of two conditions. If the exporter attests that the nation in which the shrimp originated (that is, in whose waters the shrimp were harvested) has been certified under section 609(b)(2), the shrimp may be imported without further ado. Alternatively, if the country of origin has not been certified under section 609(b)(2), shrimp harvested in its waters may still enter the United States if both the exporter and an official of the harvesting nation attest that the individual shipment of shrimp in question was harvested under conditions that do not adversely affect sea turtles. Shipments meeting these conditions include those of aquaculture- grown shrimp, hand-caught shrimp, and shrimp harvested by vessels equipped with TEDs.[3] Thus, under the government's interpretation of section 609, a country may export shrimp to the United States either by requiring its entire fleet to be equipped with TEDs (and becoming certified under section 609(b)(2)), or by requiring TEDs only on those vessels catching shrimp destined for the United States market.[4]

Turtle Island interprets section 609 somewhat differently. Turtle Island believes that section 609 requires the government to prohibit the importation of all shrimp from uncertified countries. Under Turtle Island's interpretation of the statute, certification is the *only* way in which shrimp may be imported into the United States. In practice, this means that in countries where shrimp and endangered sea turtles frequent the same waters, all shrimping vessels must be

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[3] Each shipment must be accompanied by a "DSP 12" form, which attests either that the shipment was harvested in the waters of a certified country or that the shipment was harvested by one of the permissible methods.

[4] In practice, TED-equipped vessels and non-TED-equipped vessels do not seem to fish side by side in the waters of uncertified countries. Currently, uncertified countries that export shrimp to the United States enforce TED requirements on vessels plying certain fisheries but not in other fisheries. *Turtle Island Restoration Network v. Mallett*, 110 F.Supp.2d 1005, 1011-13 (Ct. Int'l Trade 2000).

equipped with TEDs if that country wishes to export *1287 shrimp to the United States.[5] Turtle Island argues that this interpretation is mandated by the plain language, intent, and legislative history of the statute.

The contest between Turtle Island and the government over the interpretation of section 609 has a long and tortured history, chiefly marked by the government's Protean efforts to escape the statutory interpretations being imposed upon it by the Court of International Trade. In the government's initial implementation of section 609 (the 1991 and 1993 Guidelines), the embargo was imposed only against shrimp from the Gulf of Mexico Caribbean Western Atlantic Ocean sea areas, harvests in those areas being the apparent focus of section 609 when the statute was enacted. *See Revised Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations*, 58 Fed.Reg. 9015 (Feb. 18, 1993); *Turtles in Shrimp Trawl Fishing Operations Protection; Guidelines*, 56 Fed.Reg. 1051 (Jan. 10, 1991). But under the 1991 and 1993 Guidelines, national certification under section 609(b)(2) was the only way a harvesting nation could export shrimp to the United States. The import of shrimp from uncertified countries was prohibited, even if those particular shrimp had been caught using TEDs.

In 1992, the Earth Island Institute, a nonprofit environmental group and Turtle Island's immediate predecessor, filed suit against the government in the Northern District of California. Earth Island sought to force the government to initiate negotiation of international agreements for sea turtle conservation as demanded by section 609(a), and sought to force the government to apply the embargo against all shrimp-exporting countries, not just those of the wider Caribbean area. Earth Island was rebuffed on both fronts. The Ninth Circuit refused to enforce the

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[5] Turtle Island apparently does not object to permitting import of aquacultured shrimp or hand-caught shrimp from uncertified countries.

negotiation directives of section 609(a), reasoning that since the power to negotiate with foreign nations was committed to the executive branch, enforcement of section 609(a) would violate the constitutional separation of powers. *Earth Island Inst. v. Christopher*, 6 F.3d 648, 653 (9th Cir.1993). Furthermore, the Ninth Circuit ruled that because 28 U.S.C. § 1581(i) vests exclusive jurisdiction over embargoes and other trade restrictions in the Court of International Trade, an action to compel enforcement of the import prohibitions of section 609(b) could lie only with that court. *Id.* at 652.

Earth Island proceeded to refile its suit in the Court of International Trade, seeking to force the government to apply section 609(b)'s import restrictions worldwide, not just against shrimp harvested in the wider Caribbean region. The Court of International Trade agreed with Earth Island that the embargo should be applied across the board. The Court of International Trade also made clear its view that the government had limited enforcement of section 609(b) to the Caribbean region not because the government genuinely believed the statute to be so limited, but because of the economic and political fallout that would ensue from targeting countries outside the wider Caribbean. *See Earth Island Inst. v. Christopher*, 913 F.Supp. 559, 576-77 (Ct. Int'l Trade 1995). Finding no geographical restrictions in the text of section 609, the Court of International Trade concluded that the government had not been properly enforcing section 609(b) and directed the government to prohibit the importation of shrimp--"wherever harvested in the wild"--that *1288 were harvested with commercial fishing technology that may adversely affect the species of sea turtles protected by section 609. *Id.* at 580.

In response to the Court of International Trade's decision (and following the Court of International Trade's refusal to grant a one-year extension of time for enforcement, *Earth Island Inst. v. Christopher*, 922 F.Supp. 616 (Ct. Int'l Trade 1996)), the Department of State issued new regulations implementing section 609(b). *Revised Notice of Guidelines*

for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 61 Fed.Reg. 17,342 (April 19, 1996). Complying with the Court of International Trade's order in *Earth Island*, the 1996 Guidelines restricted imports of shrimp harvested from all waters inhabited by sea turtles, not just those of the wider Caribbean region. However, in contrast to the 1991 and 1993 Guidelines, the 1996 Guidelines permitted imports of shrimp from waters of uncertified nations-so long as the exporter presented a declaration (the DSP 12 form) attesting that the shrimp accompanying the declaration were harvested under conditions that did not adversely affect the protected species of sea turtles. Thus, under the 1996 Guidelines, a nation did not need to be certified under section 609(b)(2) in order to export shrimp to the United States. Instead, a nation could comply with section 609 simply by employing TEDs on those vessels harvesting shrimp bound for the United States market.

Earth Island was less than pleased with the government's new interpretation of section 609. It filed with the Court of International Trade a "motion to enforce" the Court of International Trade's 1995 judgment, on the grounds that permitting import of TED--caught shrimp from uncertified nations would not conform with the Court of International Trade's 1995 order directing the State Department to implement section 609 world-wide.

The Court of International Trade agreed with Earth Island that section 609(b)(1)'s embargo should be applied on a nation-by-nation basis, rather than on a shipment-by-shipment basis. The Court of International Trade's interpretation of section 609 rested on two grounds. First, the Court of International Trade refused to read the language of section 609(b)(1) in isolation. Reasoning that section 609(a) directed the Secretary of State to pursue negotiations with foreign nations, and that section 609(b)(2) required the President to determine whether a foreign nation's regulatory programs met United States standards for protection of sea

turtles, the Court of International Trade concluded that section 609(b)(2) should be read *in pari materia* with the other sections of section 609. As such, the import restrictions of section 609(b)(2) should be applied nation-by-nation, and not shipment-by-shipment. *Earth Island Inst. v. Christopher*, 942 F.Supp. 597, 603-04 (Ct. Int'l Trade 1996).

The Court of International Trade's second rationale was based on its earlier conclusion that section 609 supplemented the Endangered Species Act ("ESA") and should also be read *in pari materia* with the ESA. *Earth Island Inst. v. Christopher*, 890 F.Supp. 1085, 1092 (Ct. Int'l Trade 1995). The Court of International Trade took from the ESA the principle that "the plain intent of Congress in enacting this statute was to halt and reverse the trend towards species extinction, whatever the costs." *Earth Island*, 942 F.Supp. at 606 (quoting *Earth Island*, 913 F.Supp. at 576, in turn quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978)). Accepting (in the absence of contrary evidence from the government)*1289 Earth Island's claim that the shipment-by-shipment approach would undermine the incentive for uncertified nations to become certified, the Court of International Trade agreed with Earth Island that the 1996 Guidelines would "eviscerat[e] the goal of Congress in enacting section 609." *Earth Island*, 942 F.Supp. at 604. Accordingly, the Court of International Trade prohibited the government from permitting the import of shrimp unless the harvesting nation had been certified under section 609(b)(2). *Id.* at 617.

There followed another ruling from the Court of International Trade, denying the government's request for a stay of enforcement but clarifying that the embargo did not apply to aquacultured shrimp or hand-caught shrimp, as these fishing technologies would not adversely affect sea turtles and were exempted from section 609 from the start. *Earth Island Inst. v. Christopher*, 948 F.Supp. 1062, 1069 (Ct. Int'l Trade 1996). However, Earth Island had sought to withdraw its "motion to enforce" shortly before the Court of

International Trade issued its first ruling on the 1996 Guidelines, leaving only its request for attorney fees before the Court of International Trade. *Earth Island*, 942 F.Supp. at 602 n. 7. The stated purpose of its attempted withdrawal was to preserve Earth Island's right to gather additional evidence and to challenge the government's revised guidelines in a separate action.[6] *Id.*; *Earth Island Inst. v. Albright*, 147 F.3d 1352, 1355 (Fed.Cir.1998). The Court of International Trade denied Earth Island permission to withdraw, basing its refusal on the public interest at stake in proper enforcement of section 609. Earth Island, 942 F.Supp. at 602 n. 7.

Upon the government's appeal to this court, we held that Earth Island "did not request permission to withdraw, but unilaterally and unconditionally withdrew its motion." *Earth Island*, 147 F.3d at 1356. We further held that Earth Island's unconditional withdrawal ended the controversy between the parties, thereby terminating the Court of International Trade's jurisdiction over the case except for the matter of attorney fees. *Id.* Accordingly, we vacated the Court of International Trade's orders that had directed the State Department to enforce section 609 on a nation-by-nation basis. *Id.* at 1358.

Meanwhile, during the period that the Court of International Trade had enjoined the government from permitting the import of TED-caught shrimp from uncertified nations, a group of such nations--India, Pakistan, Malaysia, and Thailand--brought a proceeding against the United States before the Dispute Settlement Body of the World Trade Organization ("WTO"), arguing that the enforcement of section 609 under the 1996 Guidelines violated certain provisions of the 1994 General Agreement on Tariffs and

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[6] Apparently, Earth Island lacked confidence that its challenge to the 1996 Guidelines could be resolved in its favor on the basis of the evidence in record. The decision of the Court of International Trade proved those fears groundless.

Trade ("GATT"). Ultimately, the WTO Appellate Body ruled that section 609 was a permissible conservation measure under GATT Article XX, but that the United States' enforcement of section 609 was discriminatory. *United States--Import Prohibition of Certain Shrimp and Shrimp Products*, 1998 WL 720123 (Oct. 12, 1998). Specifically, the WTO pointed to the fact that shrimp caught using methods identical to those employed in the United States (*i.e.*, with TEDs) were embargoed solely because they were caught in the waters of uncertified countries. *Id.* at *47. And while the statute itself might permit a flexible approach, *1290 the 1996 Guidelines demanded that a country adopt a regulatory regime identical to that of the United States as the only path to certification. *Id.* at *46. Furthermore, the failure of the United States to initiate serious international negotiations to protect sea turtles (as demanded by section 609(a)) supported a finding of unjustifiable discrimination. *Id.* at *51.

After this court vacated the Court of International Trade's injunction against the government, the State Department issued new Guidelines reinstating importation of shrimp from uncertified countries. *Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*, 63 Fed.Reg. 46,094 (Aug. 28, 1998). Like the 1996 Guidelines, the 1998 Guidelines permitted import of shrimp from uncertified countries if the shipment was accompanied by a DSP 12 form attesting that the shrimp had been harvested by vessels equipped with TEDs. Its earlier victory having been negated for lack of jurisdiction, Earth Island again filed suit challenging the new regulations in the Court of International Trade, which (not surprisingly) again found that importation of shrimp from uncertified countries violated the provisions of section 609(b). *Earth Island Inst. v. Daley*, 48 F.Supp.2d 1064, 1081 (Ct. Int'l Trade 1999). Soon afterwards, the State Department issued its 1999 Guidelines. Designed to meet the WTO's

objections, the 1999 Guidelines took a more flexible stance on which regulatory programs would merit national certification, but the 1999 Guidelines continued to permit importation of TED- caught shrimp from uncertified countries. Accordingly, the Court of International Trade yet again held that the shipment-by-shipment approach violated section 609 and entered a final declaratory judgment in favor of Turtle Island--which by now had been spun off as an independent entity from the Earth Island Institute. *Turtle Island Restoration Network v. Mallett*, 110 F.Supp.2d 1005, 1018 (Ct. Int'l Trade 2000).

However, although the Court of International Trade concluded "without reservation that the plaintiffs have *prevailed*" in their argument that the importation of TED-caught shrimp from uncertified nations violated the terms of section 609, *id.*, the Court of International Trade denied Turtle Island injunctive relief. Moreover, the Court of International Trade refused to hold that the government's legal position was not substantially justified, barring Turtle Island from collecting attorney fees under the Equal Access to Justice Act. The Court of International Trade appeared to base these conclusions on the fact that of all the countries exporting shrimp to the United States, only Brazil and Australia were not certified, suggesting that relatively few sea turtles were being harmed in the waters of uncertified nations that served the United States shrimp market. *Id.* at 1011-12. Moreover, no nation that had previously established a nation-wide TED program had limited its regulatory program in favor of equipping only those vessels that served the United States market with TEDs. *Id.* at 1013. Given the absence of proof that shrimp trawling by uncertified nations was currently contributing significantly to sea turtle mortality, and in apparent recognition of the traditional reluctance of courts to intrude into matters of foreign relations, the Court of International Trade concluded, somewhat cryptically:

> given the facts and circumstances of this case, which obviously transcend purely domestic concerns, this court is unable to conclude that the government's position *1291 currently is not substantially justified....
>
> The court's inability means not only that plaintiff's application for any award of fees etc. cannot be granted, the motion for injunctive relief based upon the declaratory judgment in their favor must also be denied.

Id.

After the Court of International Trade issued its final judgment in *Turtle Island Restoration Network v. Mallett*, Malaysia renewed its challenge to the United States over enforcement of section 609 before a panel of the Dispute Settlement Body of the World Trade Organization. However, the panel ruled, and the Appellate Body affirmed, that the enforcement of section 609 under the State Department's 1999 Guidelines was justified under Article XX of GATT. These conclusions were based in part on the Court of International Trade's refusal to grant Turtle Island an injunction against the government, since under that ruling the United States continued to permit the import of TED-caught shrimp from uncertified countries. *United States--Import Prohibition of Certain Shrimp and Shrimp Products*, 2001 WL 671012, at *101 (Jun. 15, 2001). Moreover, the United States had initiated serious international negotiations for sea turtle protection, and now required nations to establish for certification a sea turtle program comparable in effectiveness to that of the United States--not necessarily one identical to that of the United States. *United States--Import Prohibition of Certain Shrimp and Shrimp Products*, 2001 WL 126572, at *38-49; *51-54 (Oct. 22, 2001). Consequently, the enforcement of section 609 was ruled a permissible conservation measure and not discriminatory under Article XX of GATT.

Turtle Island now appeals the Court of International Trade's denial of an injunction and attorney fees. The government appeals the judgment of the Court of International Trade that the importation of TED-caught shrimp from uncertified countries as permitted by the 1999 Guidelines violates section 609. We exercise appellate jurisdiction over the final decision of the Court of International Trade under 28 U.S.C. § 1295(a)(5).

I

We first consider whether the Court of International Trade reached the proper construction of section 609, as the propriety of the Court of International Trade's denial of injunctive relief and attorney fees will hinge on whether Turtle Island or the government has advocated the appropriate interpretation of the statute. We must therefore decide whether section 609(b)(1) of Pub.L. 101-162 prohibits importation of all shrimp or shrimp products from a country not certified under section 609(b)(2), or whether the government may permit the import of individual shipments from uncertified countries if exporters represent that those particular shipments were caught without the use of commercial fishing technology that may adversely affect those species of sea turtles protected by domestic law. Statutory interpretation is a matter of law that we review without deference to the interpretation reached by the Court of International Trade. *SKF USA Inc. v. United States*, 263 F.3d 1369, 1378 (Fed.Cir.2001).

A

We begin, as in all questions of statutory interpretation, with the plain words of the law, and in this case those words weigh heavily in the government's favor. The operative language of the embargo is found in section (b)(1), which prohibits importation of shrimp, "which have been harvested with commercial fishing *1292 technology" that may harm sea turtles, except as provided in (b)(2). The clause "which have been harvested" modifies "shrimp." "Shrimp" are

discrete objects, each of which has either been harvested with technology harmful to sea turtles or not. The statute distinguishes between the former shrimp, which are embargoed, and the latter shrimp, which are not. The plain language of the statute provides no basis for embargoing shipments of shrimp which have *not* been harvested with commercial fishing technology that may harm sea turtles. Because TED-caught shrimp have not been harvested with commercial fishing technology that may harm sea turtles, the statutory language does not support embargoing TED-caught shrimp from uncertified countries. Moreover, if certification under (b)(2) was the *only* way shrimp could be imported into the United States, then "which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles" in (b)(1) is largely superfluous language. We cannot see how the "harvested with commercial fishing technology" language could consistently be interpreted to permit import of some shrimp that have been harvested without adverse effect on sea turtles--such as aquacultured or hand- caught shrimp from uncertified countries--but to ban the import of other shrimp that have been harvested without adverse effect on sea turtles--such as TED- caught shrimp from uncertified countries.

Recognizing the primacy of the plain language in the hierarchy of statutory interpretation, Turtle Island tries to advance several arguments under that rubric. It argues that its interpretation is consistent with congressional intent, with other portions of the statute, and with the law's ultimate purpose--all of which might be true but none of which states an argument based on the plain language of the statute. Turtle Island cannot escape the fact that it seeks to interpolate words into the plain language of the statute, reading 609(b)(1) as an embargo on "shrimp which have been harvested *from a nation that employs* commercial fishing technology which may affect adversely said species of sea turtles." While the text might not absolutely bar such an

interpolation, this interpretation does not comport with the most direct reading of the law's words.

In any event, we do not find persuasive the argument based on conformity with the remaining sections of section 609. Turtle Island points to section 609(a), which directs the Secretary of State to negotiate with foreign *nations* to protect sea turtles, and to section 609(b)(2), which establishes a procedure for *nations* to be certified as exempt from the embargo of section 609(b)(1). The Court of International Trade drew from this structure the conclusion that, reading those sections of the law *in pari materia* with the embargo provisions, the embargo provisions must refer to other nations, and not to individual shipments of shrimp. *Earth Island*, 942 F.Supp. at 603-604. We cannot agree with this reasoning. The fact that other portions of the statute direct the Secretary of State to negotiate with and certify nations does not demand that the Secretary apply the embargo to entire nations as well. One negotiates with nations and imports shrimp, not vice versa. Congress drafted sections 609(a) and 609(b)(2) to refer to nations because the negotiation and certification provisions could not have been drafted in any other way--not because Congress made a conscious choice to focus them on nations rather than shipments. An embargo provision, on the other hand, might be drafted either to apply to shipments or to nations, and we do not think Congress was foreclosed from embargoing individual shipments of shrimp *1293 simply because it included the embargo provisions in a law that also speaks of nations. We find nothing inherently insensible about applying the negotiation and certification provisions to nations on the one hand, and the embargo provisions to particular shipments of shrimp on the other.

B

Both sides also lay claim to the legislative history of section 609. The State Department finds some congressional intent to delegate the definition of which shrimp should be

embargoed, while Turtle Island finds both the nation-by-nation principle and the conclusion that section 609's principal goal is the protection of endangered sea turtle species worldwide. We cannot find support for the State Department's position. While Congress may have intended the administering agency to define which methods of harvesting shrimp may adversely affect sea turtles, we find no intent to delegate the power to define the scope of the embargo itself. But our disagreement with Turtle Island's view of the legislative history is more profound and more damaging to its case. For we find nothing in the legislative history to mandate a nation-by-nation approach, and we find little, if any, indication that minimizing sea turtle drownings was Congress's main concern when it enacted section 609.

The extant legislative history of section 609 consists mostly of speeches on the Senate floor. Turtle Island emphasizes portions of this record in which Senators speak of "other nations" and "countries" to support its position that section 609(b)(1) was intended to operate nation-by- nation. We are not inclined to assign much weight to these excerpts. Although the Senators spoke more in terms of nations than of shipments or vessels, their usage was not consistent. For example, Appropriation Chairman Hollings described the provision when brought to the Senate floor as:

> It calls for a ban on *imports of shrimp from any nation* that: First, fails to adopt a regulatory program for turtle protection which is comparable to that of the United States; and second, has higher incidental catches of sea turtles than U.S. shrimpers.

135 Cong. Rec. 22,493-94 (1989) (emphasis added), but described the final version after conference with the House as follows:

> At the request of the House managers we approved an addition on the ban on *imported shrimp not harvested by vessels using TED's* shall not apply [sic] if the "particular fishing environment of the

> harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting."

135 Cong. Rec. 26,613 (1989) (emphasis added). The relevant provisions of the bill had not changed; Senator Hollings's shift simply indicates how loosely Senators described the bill. Given the imprecision and informality of the floor comments, we are loath to assemble congressional intent from such scraps of casual word choice.

Furthermore, most of the comments marshaled by Turtle Island do not reflect the Senate's interpretation of the embargo provisions of section 609(b)(1), because those comments were made in support of a bill that lacked any embargo provisions at all. As first introduced by Senator Breaux, "Amendment No. 365" included *only* the provisions now appearing as 609(a), requiring the Secretary to initiate negotiations for international sea turtle conservation and to report on other nations' efforts to protect sea turtles. See 135 Cong. Rec. 15,508 (1989). Apparently, an earlier measure had included some kind of embargo, but that measure was never brought to the floor because the Senate *1294 Finance Committee feared that such an embargo might violate the GATT. See *id.* at 15,509 (statements of Sens. Bentsen and Lott). The floor statements in support of the original bill refer to "other nations" and "countries" because international negotiations were the sole focus of the original bill. While the supporters of the original bill clearly hoped to induce foreign nations to adopt TED requirements, we cannot derive from their description of the negotiation provisions a nation-by-nation approach to the embargo.

The original "Amendment No. 365" was not brought to a vote, but soon resurfaced as a measure including the embargo provisions of 609(b) as well as the negotiation provisions of 609(a). We have no indication why the new embargo provisions did not provoke concerns about GATT violations. But what is unmistakably clear from the discussion on the

Senate floor is that the primary purpose of the bill was to protect the domestic shrimping industry, and not the sea turtle. The advocates of the bill were Senators from Gulf states who had long opposed the domestic TED regulations because they believed that TEDs reduced shrimp catches. See 135 Cong. Rec. 22,554-55 (1989) (statements of Sens. Johnston and Breaux). The Senators who spoke in favor (none spoke against) feared that American shrimpers would be at a disadvantage competing in the domestic market with foreign shrimpers, who were not burdened with TED regulations. By imposing TED requirements on foreign shrimpers exporting to the United States, the sponsors of section 609 hoped to provide American shrimpers with a level playing field. Senator Shelby's comments in support of the original version of the bill (lacking the embargo provisions) explain this reasoning well:

> Shrimpers are having numerous problems in using the TED's. It is my understanding that the Gulf of Mexico has been overwhelmed with seagrass in recent months causing the clogging of the openings of the TED's. Consequently, shrimpers are losing considerable amounts of their catch, which translates into reductions in income. There has been little evidence to date to indicate that the use of TED's will significantly affect the survival rate of sea turtles.... The U.S. shrimp industry is being treated unfairly in being asked to risk economic ruin while others are not required to do similarly. The burden of saving the sea turtles should be shared equally.... In addition, other countries have extensive commercial shrimp operations that are not subjected to turtle conservation. This places our shrimp industry in a noncompetitive situation because these countries still share the lucrative U.S. market with our domestic shrimpers. Our domestic shrimpers must have a level playing field.

135 Cong. Rec. 15,511 (1989).

Similar arguments were advanced by Senators Bentsen, *id.* at 15,509, Lott, *id.* at 15,509-10, Breaux, *id.* at 15,508-09, and Johnston, 135 Cong. Rec. 22,554 (1989). Each expressed his concern that the domestic shrimp industry was threatened because U.S. shrimpers, bearing the alleged increased costs of TEDs, would have to compete with foreign shrimpers not so burdened. By requiring or encouraging other nations to catch shrimp bound for the United States market with TEDs, imported shrimp would cost more and be less competitive with domestic shrimp. Alternatively, if foreign shrimp was embargoed, the price of shrimp would rise, also benefiting the domestic shrimp industry. *Id.* (statement of Sen. Johnston).

Thus, to the extent legislative history is available, we find that Congress with remarkable unanimity was focused on *1295 protecting the domestic shrimp industry, not the sea turtle, when it enacted section 609. Many of the comments made on the Senate floor reflected deep skepticism about the effectiveness of TED requirements, and about the wisdom of placing sea turtle conservation above the economic well-being of domestic shrimpers. We therefore cannot agree with Turtle Island that the fidelity of the government's implementation of section 609 should be measured solely by how effectively the measures protect endangered sea turtles.

Nor can we agree with Turtle Island that requiring foreign nations to install TEDs on vessels not serving the United States market would advance Congress's aim of achieving parity for the domestic shrimp industry. Congress did not seem to foresee that a nation might equip vessels serving the United States market with TEDs but forego TEDs on its other vessels. Turtle Island argues that requiring such nations to equip their entire fleets with TEDs would benefit the United States shrimp industry, because it would place domestic shrimpers exporting shrimp to overseas markets on an equal footing with foreign shrimpers exporting shrimp to the same markets. But coursing through the legislative

history is an unswerving focus on the United States market, not overseas markets. There is no indication from the legislative history, and no evidence in the record, that domestic shrimpers compete in foreign markets.

Whether or not Congress was correct that the domestic TED requirements handicapped domestic shrimpers, Congress was concerned with the effects of TEDs on the United States market alone. Congress enacted a measure applicable to only those sea turtles encountered by American shrimpers,[7] and Congress enacted the embargo to protect what it saw as unfair competition in the American market. As such, Congress was concerned with those foreign vessels harvesting shrimp for the United States market, not foreign vessels harvesting shrimp for foreign markets. We find Congress's intent met by the State Department's current system of enforcing section 609(b), which regulates all imports of shrimp into the United States market. The contemporary legislative history provides no basis for extending section 609(b)'s reach in an attempt to control how shrimp bound for foreign markets are harvested.

C

We find further indication that section 609(b)(1) refers to shipments, not nations, when we compare it to similar statutes.[8] Congress has drafted other statutes with explicit nation-by-nation embargoes, but did not do so in the case of section 609(b). Congress has enacted nation-by-nation

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[7] Section 609(a) specifies "those species of sea turtles the conservation of which is the subject of regulations promulgated by the Secretary of Commerce on June 29, 1987"--that is, the domestic TED regulations.

[8] We note in passing that section 609(b)(1) seems clearly patterned after the text of the Marine Mammal Protection Act of 1972, 16 U.S.C. § 1371(a)(2), as that statute stood when section 609 was enacted in 1989. However, neither party submitted an argument in their briefs based on this resemblance.

embargoes triggered by foreign restrictions on fishing rights of U.S. vessels:

> the Secretary of the Treasury shall immediately take such action as may be necessary and appropriate to prohibit the importation into the United States ... fish or fish products, *from any fishery of the foreign nation concerned*, which the Secretary of State finds to be appropriate....

*1296 16 U.S.C. § 1825(b)(2) (2000) (emphasis added); by nations conducting large-scale driftnet fishing outside their exclusive economic zones:

> The President ... shall direct the Secretary of the Treasury to prohibit the importation into the United States of *fish and fish products ... from that nation.*

16 U.S.C. § 1826a(b)(3)(A) (2000) (emphasis added); and by fishing operations or other trade threatening endangered species:

> the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of *any products from the offending country* for any duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the World Trade Organization....

22 U.S.C. § 1978(a)(4) (Supp. V 1999) (emphasis added).

When Congress omits from a statute a provision found in similar statutes, the omission is typically thought deliberate. *See, e.g., I.N.S. v. Phinpathya*, 464 U.S. 183, 190, 104 S.Ct. 584, 78 L.Ed.2d 401 (1984). In very similar instances, Congress has explicitly embargoed *all* imports from the offending nation, regardless of whether any particular shipment was taken in a manner that would threaten endangered species. The fact that Congress declined to include such language in section 609(b) suggests that Congress did not intend to impose a similar embargo there.

D

Turtle Island also argues that allowing an exporting nation to equip only those vessels serving the United States market will undo the ends of section 609, since those turtles escaping from the TED-equipped trawl nets "inevitably will die" in the nets of other vessels trawling the same waters that are not equipped with TEDs. As we state above, section 609 was not enacted with the primary goal of minimizing sea turtle deaths. But as a matter of pure logic, we cannot agree with Turtle Island's predictions. Assuming sea turtles obey the laws of terrestrial probability, then a fleet partially equipped with TEDs will kill fewer sea turtles than a comparable fleet without any TEDs (so long as there are a finite number of trawling vessels and some sea turtles survive[9]). A fleet fully equipped with TEDs would likely save more turtles, but equipping only a portion of a fleet with TEDs is not entirely futile. Moreover, if Turtle Island's view is correct, then permitting the import of aquacultured or hand-caught shrimp from uncertified nations may also frustrate the purpose of section 609-because nations may export such shrimp to the United States but still harvest shrimp bound for other markets with trawl nets lacking TEDs.

Turtle Island also argues that permitting uncertified nations to export shrimp to the United States will lower the incentive for uncertified nations to become certified. But even if we thought that Turtle Island's approach would encourage more nations to enact certification programs, or save more sea turtles, we cannot give weight to such considerations if the will of Congress is dispositive. To quote Turtle Island's own argument, a court's "individual appraisal of the wisdom or unwisdom of a particular course

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[9] If the depredations of that portion of the fleet not equipped with TEDs were so great as to drown all the turtles in the area, then both fleets would drown the same number of turtles-that is, all of them. However, not even Turtle Island makes such an allegation.

consciously selected by the Congress" simply is not *1297 relevant; "[o]nce the meaning of an enactment is discerned ... the judicial process comes to an end." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). Because we find that the combination of plain language, legislative history, and comparison with other statutory provisions decisively establishes the meaning of section 609(b), we need not consider more attenuated arguments on the wisdom of the government's implementation of section 609.

Likewise, because the meaning of section 609 is clear, we need not reach the question of how much deference we ought to accord the State Department's interpretation of section 609, or whether the State Department's interpretation would minimize potential conflicts with international trade agreements. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The intent of Congress is clear and the government's current implementation of section 609(b) carries out that intent.

CONCLUSION

However much we may respect Turtle Island's long struggle on behalf of the Earth's endangered sea turtles, we cannot find that Congress shared Turtle Island's current position when it enacted section 609 of Pub.L. 101-162. Having concluded that the State Department's interpretation of section 609 is the correct one, we must also hold both that Turtle Island is not entitled to an injunction, and that the government's legal position was substantially justified within the meaning of the Equal Access to Justice Act. We therefore reverse the Court of International Trade's judgment that the government's decision topermit the importation of TED-caught shrimp from uncertified nations is not in accordance with section 609(b) of Pub.L. 101-162, and affirm the Court

of International Trade's denial of injunctive relief and attorney fees.

COSTS

No costs.

REVERSED-IN-PART AND AFFIRMED-IN-PART

PAULINE NEWMAN, Circuit Judge, dissenting.

I respectfully dissent, for the majority's decision negates the statutory method of protecting endangered sea turtles. The Court of International Trade applied the statute in accordance with its terms. Whatever the political or diplomatic considerations, neither the executive agency charged with administering the statute, nor this court, has authority to depart from the statute as enacted.

The Court of International Trade held that the State Department's 1998 Revised Guidelines[1] are not consistent with the authorizing statute, section 609 of Public Law 101-162, enacted in 1989 for the protection of endangered sea turtles. The relevant statutory provisions are:

> *1298 § 609(b)(1) In general.--The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles shall be prohibited not later than May 1, 1991, except as provided in paragraph (2).

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[1] *Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*, 63 Fed.Reg. 46094 (Aug. 28, 1998). The plaintiffs challenged the 1998 Guidelines, now superseded by the 1999 Guidelines, which do not differ as to the point here at issue. *Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*, 64 Fed.Reg. 36946 (July 8, 1999).

§ 609(b)(2) Certification procedure.--The ban on importation of shrimp or products from shrimp pursuant to paragraph (1) shall not apply if the President shall determine and certify to the Congress not later than May 1, 1991, and annually thereafter that--

(A) the government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and

(B) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or

(C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

16 U.S.C. § 1537 note.

The Court of International Trade held that section 609 prohibits the importation into the United States of shrimp from countries that do not require their shrimp trawls to protect sea turtles to at least the same extent as is required of United States shrimp vessels. The State Department's 1991 guidelines initially interpreted the statute in accordance with this meaning and in compliance with section 609(b), but limited enforcement and potential certification to fourteen Caribbean countries. However, various environmental groups were concerned at the State Department's limitation to Caribbean countries, and in 1994 the plaintiffs sued for broader enforcement of section 609. In 1995 the Court of International Trade held that the statute was not limited to the Caribbean area. *Earth Island Inst. v. Christopher*, 913 F.Supp. 559 (Ct. Int'l Trade 1995). Eleven Caribbean countries had been certified at the time of this ruling.

In 1996 the State Department changed its interpretation of section 609, apparently in response to trade-related

objections. The Department issued new Guidelines, and no longer required that all of a nation's shrimp trawlers meet standards at least as rigorous as those imposed on shrimpers in United States waters. The 1996 Guidelines instead adopted shipment-by-shipment certification, which required only that the particular shrimp imported into the United States were harvested by a ship fitted with turtle exclusion devices (TEDs). Such shrimp could be imported, whether or not any other ship in the nation's shrimp fleet used turtle-protective devices. During this period four countries in Central America received full certification, as well as nations that harvest only cold water shrimp (beyond the range of sea turtles), and nations that use aquaculture or hand (artisanal) shrimp fishing methods.

In response to the 1996 Guidelines, the plaintiffs who had prevailed in 1995 filed a "motion to enforce" the Court of International Trade's judgment, challenging the shipment-by-shipment approach as contrary to section 609. The Court of International Trade agreed with the plaintiffs and enjoined the government from importing any shrimp or products from shrimp harvested in the wild by vessels of uncertified nations. *Earth Island Inst. v. Christopher*, *1299942 F.Supp. 597 (Ct. Int'l Trade 1996). International pressures increased at this time, including complaints that this interpretation of section 609 was in violation of the General Agreement on Tariffs and Trade (GATT). In 1998 this court reversed the injunction, finding that the Court of International Trade lacked jurisdiction to rule on the motion to enforce because the plaintiffs had withdrawn the motion. *Earth Island Inst. v. Albright*, 147 F.3d 1352, 1356 (Fed.Cir.1998). Following this court's decision, the State Department issued the 1998 Guidelines, reinstating the shipment-by-shipment approach; these are the guidelines at issue in this case.

The Court of International Trade in April 1999 again held that the State Department's interpretation of section 609 was incorrect. The court held that section 609(b)(2) limits section 609(b)(1) to shrimp from countries that meet the

certification requirements of section 609(b)(2). The court explained that the statute requires country certification, not shipment-by- shipment certification as to the particular load of shrimp:

> [P]aragraph (1) of section 609(b) is specifically contingent upon the certification procedure established by section 609(b)(2), which offers the only congressionally-approved breaches of the embargo....
>
> *Earth Island Inst. v. Daley*, 48 F.Supp.2d 1064, 1081 (Ct. Int'l Trade 1999). The court further reasoned that: Paragraphs (b)(1) and (b)(2) are *pari materia*; they cannot be read independently, or out of the context adopted by Congress, including section 609(a) [instructing negotiations to protect sea turtles worldwide], to slow or stanch the extinction of species of sea turtles.

Id.

The issue is whether, contrary to this decision of the Court of International Trade, the State Department correctly interpreted section 609 as requiring no more than that the particular shipment to the United States was harvested using a TED. My colleagues on this panel so hold. However, neither the statutory text, its legislative purpose, its enactment history, nor its contemporaneous interpretation, supports this meaning.

The Legislative Purpose

It is not disputed that sea turtles are endangered by commercial trawl shrimping.[2] The decline in sea turtle populations throughout the world has been dramatic; for example, as of 1990 the Kemp's ridley turtle population had

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[2] Five sea turtle species are listed as endangered or threatened: the loggerhead (*Caretta caretta*), Kemp's ridley (*Lepidochelys kempi*), green (*Chelonia mydas*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*).

declined to less than one percent of its abundance in 1947. *See Decline of the Sea Turtles: Causes and Prevention*, 26 National Academy of Sciences 144 (1990). The acknowledged principal cause of sea turtle deaths is capture and drowning in shrimp trawl nets. In 1987 the National Marine Fisheries Service estimated that 11,179 sea turtles were killed in southeastern United States waters each year. United States trawlers harvest eight percent of the world's supply of shrimp. Sea turtles, however, roam in warm waters worldwide, and are endangered worldwide. Globally, it was estimated that 124,000 turtles were killed each year by commercial shrimp trawlers. *See Earth Island*, 913 F.Supp. at 568.

On this background, section 609 was enacted. The statute requires nations that wish to serve the United States market to adopt turtle-protective measures no less *1300 rigorous than those imposed on our own fleet; all trawl shrimpers in United States waters are required to use turtle exclusion devices. It is generally accepted that when some trawlers use turtle exclusion devices and others do not, the turtles escaped or excluded from the nets of one trawler are often caught by trawlers without TEDs. However, if all vessels in harvest areas use turtle exclusion devices, it is estimated that the devices release "97 percent of the turtles caught in shrimp trawls." *Sea Turtle Conservation; Shrimp Trawling Requirements*, 52 Fed.Reg. 24244, 24244 (June 29, 1987). These data led to the legislation as enacted, requiring that other countries, if their shrimpers wish to sell into the United States market, protect the turtles to the same extent as required for United States vessels. At the time of enactment it was well recognized that the purpose of the legislation was to protect sea turtles in their global habitat, while assuring that United States fishermen were not competitively disadvantaged. Both goals are served by the statute's requirement that nations whose shrimp fishers wish to sell to the United States must adopt fleet-wide turtle-protection devices, and not simply place such devices on selected ships.

The Report of the Senate Committee on Appropriations explained the legislation as follows:

> It calls for a ban on imports of shrimp from any nation that: (1) fails to adopt a regulatory program for turtle protection which is comparable to that of the United States; and (2) has higher incidental catches of sea turtles than U.S. shrimpers.

S.Rep. No. 101-144, at 104 (1989). Similarly, after the Conference addition of section 609(b)(2)(C) providing that certification may be based on turtle- free shrimp fishing environments, the Conference Report of the House of Representatives explained the legislation as requiring

> a ban on importation of shrimp which have been harvested with commercial fishing technology which may adversely affect species of sea turtles subject to the regulations, not later than May 1, 1991, unless the President certifies to Congress that *the harvesting nation has adopted regulations governing the incidental taking of sea turtles in the course of shrimp harvesting comparable to regulations adopted by the U.S.*, that the average rate of the incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by U.S. vessels in the course of such harvesting or the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of sea turtles in the course of such harvesting.

H.R. Conf. Rep. No. 101-299, at 84 (1989) (emphasis added). Neither of the legislative Reports indicates that Congress intended to adopt or accept merely a shipment-by-shipment approach to importation of shrimp.

The legislative record illustrates the congressional purpose of protecting these endangered animals worldwide, while avoiding any disadvantage to domestic shrimp fishing

interests due to their obligatory use of TEDs.[3] The sponsor of section 609, Senator Breaux, explained:

> [T]he amendment I am offering today is intended to promote the international *1301 conservation of sea turtles, and to provide the groundwork for ensuring that foreign fishing interests bear as great a conservation burden as our own industry.

135 Cong. Rec. S8335, 8373-74 (daily ed. July 20, 1989). Senator Breaux further stated:

> [T]his amendment focuses on the role that other nations must play if we are to fulfill our goal of effective sea turtle conservation.

Id. at 8374. Senator Chafee also explained that the legislation serves to strengthen our Nation's commitment to protect endangered sea turtles from drowning in commercial shrimp nets.

Id at 8375. Senator Johnston also recognized that the legislation would create

> an effective protection first for sea turtles, and alternatively help for the price of shrimp for our shrimpers in Louisiana.

135 Cong. Rec. S12191, 12266 (daily ed. Sept. 29, 1989). Senator Johnston explained the commercial benefits as follows:

> What it will mean in practical terms, we think, if those countries do not take that action [to place TEDs on all vessels] the price of shrimp obviously will go up because the supply will be down, so that Louisiana shrimpers, Texas shrimpers, Florida shrimpers will in effect have some form of

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[3] At the time of enactment the concern was not the cost of a TED, which was as low as $200, but the possible reduction of the catch. The record states that experience has shown no significant reduction in catch, and indeed some ancillary advantages such as exclusion of debris and unwanted fish.

> compensation in the form of higher prices for their shrimp should these countries fail to take that action.

Id. Senator Lott reiterated the idea that the legislation would

> make sure that the other countries are taking the same measures we are. We cannot have a situation where we impose requirements on our shrimpers that other countries do not have and then allow them to use the opportunity to export a flood of shrimp into our country to fill a void that may be left.

135 Cong. Rec. S8335, 8374. Senator Shelby described the conservation programs of other nations as a condition of access to the United States market:

> If other countries are to share in the benefits of access to the $20 million U.S. market, I believe that these countries should be required to implement conservation programs comparable to that of the United States.

Id. at 8376.

There were no statements, during the extensive floor discussion, contrary to the uniform goal of protecting endangered sea turtles and avoiding disadvantage to United States shrimpers. A shipment-by-shipment approach not only weakens the incentive for countries to impose TED requirements, but it removes the anticipated "level playing field" for domestic interests, for all United States shrimpers are required to use TEDs. That the legislation was designed for country-by-country certification, not shipment-by-shipment, was reiterated by Senator Breaux:

> It is patently unfair on its face to say to the U.S. industry that you must abide by these sets of rules and regulations, but other countries do not have to do anything, and, yet, we will then give them our market. That is exactly what is happening. I think the amendment ... is a good amendment. It will

> require other countries to do exactly what we are being required to do, and if in fact they do not, they will lose the U.S. market.

135 Cong. Rec. S12191, 12266. Senator Hollings made a similar statement in describing the legislation:

> It calls for a ban on imports of shrimp from any nation that: First, fails to adopt a regulatory program for turtle *1302 protection which is comparable to that of the United States, and second, has higher incidental catches of sea turtles than U.S. shrimpers.

Id. at 12207.

Senator Hollings, after the Conference with the House, explained the addition of section 609(b)(2)(C), that a country will be certified and its shrimp imports permitted when the "particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting." 135 Cong. Rec. S14389, 14391 (daily ed. Oct. 31, 1989). This amendment clarified that the ban on importation does not apply when a nation's shrimp are grown in aquaculture, or caught by hand line (artisanal) fishing, or by trawling in cold water that is not turtle habitat. This clause did not, however, authorize or accept the use of trawl methods that do not exclude the turtles. There is no support at all for the government's theory that section 609(b)(2)(C) adjusted the legislative purpose and permitted use of shrimp fishing technology that "may affect adversely such species of sea turtles" as long as the turtle-destroying shrimp catch is not sent to the United States market.[4]

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[4] The panel majority states that it cannot see any difference between aquacultured or hand-caught shrimp and TED-caught shrimp. Aquacultured shrimp are farmed rather than caught in the open seas, with no risk to sea turtles. And hand caught shrimp do not pose a serious threat to sea turtles because of the short duration of tow times. *See Revised Guidelines for Determining Comparability of Foreign Programs*

Since United States shrimpers produce only eight percent of the world's shrimp catch, sea turtle protection was recognized as requiring a global effort. Although the panel majority's theory that "section 609 was not enacted with the primary goal of minimizing sea turtle deaths" is not supported by the legislative record, the alternative legislative goal of protecting the domestic industry is also disserved by permitting importation from nations whose other vessels do not carry turtle-exclusion devices. In addition, I do not agree with the majority that if there is a commercial aspect to legislation, the humanitarian purpose becomes irrelevant.

The Guidelines

For the first six years after enactment, the State Department interpreted section 609 as requiring an embargo of all shrimp from a nation that harvests shrimp in turtle habitat with at least some trawlers that do not use turtle exclusion devices. This interpretation was changed in the 1996 Guidelines. "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273, 101 S.Ct. 1673, 68 L.Ed.2d 80 (1981)).

It cannot be disputed that when only some of the ships trawling for shrimp use TEDs, sea turtles that are saved by the TEDs may later be captured by the vessels without TEDs. The Commerce Department itself raised this concern. Rolland Schmitten, Fisheries Administrator for the National Marine Fisheries Service, wrote as follows:

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for the Protection of Turtles in Shrimp Trawl Fishing Operations, 58 Fed.Reg. 9015, 9016 (Feb. 18, 1993). By contrast, mechanized commercial shrimp trawling constitutes a considerable threat to sea turtles, a threat that is not relieved when only some of the trawlers use TEDs.

> By requiring that TEDs be used only on those vessels that harvest shrimp for export to the U.S. market, sea turtles will be put at greater risk of incidental *1303 capture aboard non-TED equipped boats in a nation's fleet.
>
> This approach will also reduce the incentive for nations to adopt comprehensive national programs to reduce the incidental take of sea turtles ... [and] may also result in some certified nations abandoning the comprehensive programs they now have in place or curtailing enforcement of such programs.

Letter from R. Schmitten to Mary Beth West, Deputy Assistant Secretary of State for Oceans (July 28, 1998).

Although the government argues that the State Department has discretion to interpret the statute, citing *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986), in that case the Court held that the discretion exercised by the Secretary of Commerce for phased-in compliance with the national whale quota was "a reasonable construction of the language used in [the legislation]." *Id.* at 232, 106 S.Ct. 2860. Here, the State Department's interpretation is not a reasonable construction of the statute, which clearly requires country-by-country, not shipment-by-shipment, certification. An agency's statutory interpretation cannot stand if it contravenes the clearly expressed legislative intent. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *Board of Governors of Fed. Reserve Sys. v. Dimension Financial Corp.*, 474 U.S. 361, 368, 106 S.Ct. 681, 88 L.Ed.2d 691 (1986).

In its brief, the Secretary of State suggests that matters of international relations and trade pressures in the World Trade

Organization (WTO) have warranted more circumspect handling than section 609 may have originally contemplated. The government also states that global turtle protection is proceeding, albeit slowly. However, this court is not authorized to evaluate a pragmatic political accommodation. We, like the Executive branch, are bound by the law as Congress enacted it.

The World Trade Organization Litigation

The government makes much of the recent resolution of the challenge to section 609 in the WTO. In 1996 Malaysia, Thailand, India, and Pakistan challenged the United States' implementation of section 609 as contrary to the GATT. The WTO Appellate Body held that this statute was within an exception to GATT rules in that it related to conservation, but held that various aspects of the certification guidelines were discriminatory. Eventually, in 2001, on a second suit brought by Malaysia, the State Department's 1999 Guidelines (which authorize shipment-by-shipment certification) were accepted as in harmony with the GATT.

The government states that the WTO rulings "support" the State Department's interpretation. The government describes these WTO rulings as "the law of nations" and states that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains," quoting *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804). However, no party asserts that WTO decisions have controlling status as United States law. The Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreement Acts states that decisions of WTO panels and the WTO Appellate Body "have no binding effect under the law of the United States and do not represent an expression of U.S. foreign or trade policy." *1304 H.R. Doc. No. 103-316, at 1032 (1994). The SAA also states:

> If a[WTO] report recommends that the United States change federal law to bring it into conformity

> with a Uruguay Round Agreement [including the GATT], it is for the Congress to decide whether any such change will be made.

Id. The SAA is "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d); *see also* 19 U.S.C. § 3512(a)(1) ("No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.").

Thus although the government appears to rely on the WTO ruling as requiring United States (and judicial) support of the current Guidelines, neither we nor the State Department has authority to rewrite the statute. *See Suramerica de Aleaciones Laminadas C.A. v. United States*, 966 F.2d 660, 668 (Fed.Cir.1992) ("if the statutory provisions at issue here are inconsistent with the GATT, it is a matter for Congress and not this court to decide and remedy"); *Mississippi Poultry Ass'n, Inc. v. Madigan*, 992 F.2d 1359, 1366 (5th Cir.1993) (the court must "give effect to Congress' intent, even if implementation of that intent is virtually certain to create a violation of the GATT").

I repeat, it is not before us to decide whether the State Department has pursued a path that is diplomatically preferable to that selected by the Congress. The government brief states that an increasing number of nations are requiring the use of TEDs for all their trawled shrimp. These salutary developments do not relieve the judicial obligation to implement the statutory text as Congress intended and enacted it. Thus I must, respectfully, dissent from the court's incorrect statutory interpretation.

APPENDIX B

UNITED STATES COURT OF
INTERNATIONAL TRADE

TURTLE ISLAND RESTORATION NETWORK, A CALIFORNIA NONPROFIT CORPORATION; TODD STEINER; THE AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, A NEW YORK NONPROFIT CORPORATION; THE HUMANE SOCIETY OF THE UNITED STATES, A DELAWARE NONPROFIT CORPORATION; AND THE SIERRA CLUB, A CALIFORNIA NONPROFIT CORPORATION,

Plaintiffs,

v.

ROBERT L. MALLETT, ACTING SECRETARY OF COMMERCE; MADELEINE ALBRIGHT, SECRETARY OF STATE; LAWRENCE H. SUMMERS, SECRETARY OF TREASURY; DAVID B. SANDALOW, ASSISTANT SECRETARY OF STATE FOR THE BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS; PENELOPE D. DALTON, ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL MARINE FISHERIES SERVICE; AND ALAN P. LARSON, UNDER SECRETARY OF STATE FOR ECONOMIC, BUSINESS AND AGRICULTURAL AFFAIRS,

Defendants,

and

NATIONAL FISHERIES INSTITUTE, INC.,

Intervenor-Defendant.

Slip Op. 00-85

Court No. 98-09-02818

July 19, 2000.

[110 F.Supp.2d 1005]

OPINION

AQUILINO, Judge.

The plaintiffs request that the court enter final judgment in conformity with its slip op. 99-32, filed herein *sub nom. Earth Island Institute v. Daley*[1], and which hereby is incorporated by reference in this opinion. The plaintiffs also have interposed an application for award of attorneys' fees, costs and expenses pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412.

The defendants and intervenor-defendant do not oppose entry of judgment, but the government does object to any award of fees etc.

I

As discussed hereinafter, an application made pursuant to EAJA requires the court to revisit the merits of the underlying case. Here, the primary object of plaintiffs' Complaint for Declaratory Judgment, Review of Agency Action, Mandamus and Injunctive Relief has been the Department of State's *Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles *1007 in Shrimp Trawl Fishing Operations*[2], which announced that the Department was

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[1] 23 CIT ----, 48 F.Supp.2d 1064 (1999). Pursuant to formal motion, Turtle Island Restoration Network has supplanted Earth Island Institute as the first named plaintiff [*cf.* Declaration of Todd Steiner in Support of Plaintiffs' Application for Attorneys' Fees, Costs and Expenses, para. 3 (May 2, 2000)], while the names of the individuals currently occupying theU.S. government offices impleaded as defendants have been substituted in the above caption of this case in accordance with CIT Rule 25(d).

[2] 63 Fed.Reg. 46,094 (Aug. 28, 1998) [referred to hereinafter as "1998 Revised Guidelines"]. As outlined in slip op. 99-32, those guidelines issued in the aftermath of a report of a panel of the Dispute Settlement Body ("DSB") of the World Trade Organization ("WTO") *sub nom. United States--Import Prohibition of Certain Shrimp Products,*

reinstating its determination that the harvesting of shrimp with TEDs does not adversely affect sea turtle species and that TED-caught shrimp is therefore not subject to the import prohibition created by Section 609(b)--(1).... [H]owever, the Department ... has decided to establish several conditions and incentives relating to the importation of such shrimp that are intended to address concerns that have been raised about the effect of this determination on the conservation of sea turtle species.[3]

Those concerns were stated to be that foreign harvesters will fraudulently claim that shrimp have been harvested with TEDs, that foreign nations which have established regulatory programs comparable to the U.S. program will abandon or limit them so that only trawlers harvesting shrimp for export to the United States will actually employ TEDs, and that other nations which may be considering the adoption of such a program may opt instead for equipping only those vessels trawling for shrimp for the American market. See 63 Fed.Reg. at 46,095.

WT/DS58/R (15 May 1998), and during an appeal therefrom by the United States to that organization's Appellate Body, which issued its decision on October 12, 1998 *viz. United States--Import Prohibition of Certain Shrimp and Shrimp Products Report of the Appellate Body*, WT/DS58/AB/R. *See* Defendants' Public Appendix 3, Defendants' Response in Opposition to Plaintiffs' Application for Attorneys' Fees, Costs and Expenses [cited *infra* as "Defendants' Opposition to Fees"].

[3] 63 Fed.Reg. at 46,095. The acronym "TEDs" refers to various turtle excluder devices. *See generally Earth Island Institute v. Christopher*, 19 CIT 1461, 1463 and 913 F.Supp. 559, 563, n. 1 (1995), and references cited therein. For more recent developments, see, for example, Department of Commerce, National Oceanic and Atmospheric Administration, *Endangered and Threatened Wildlife; Sea Turtle Conservation Requirements*, 65 Fed.Reg. 17,852 (April 5, 2000).

The statute cited is Pub.L.No. 101-162, § 609, 103 Stat. 988, 1037-38 (1989), which is codified at 16 U.S.C. § 1537 note and reprinted in full in slip op. 99-32, 23 CIT at ----, 48 F.Supp.2d at 1066-67, and which will be referred to as "section 609".

Following publication in Geneva of the WTO Appellate Body's report, and just before this court's slip op. 99-32 was handed down, the Department of State issued its *Notice of Proposed Revisions to Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*[4], advising, among other things, that on November 25, 1998, the United States announced its intention to implement the recommendations and rulings of the DSB in a manner which is consistent not only with U.S. WTO obligations, but also with the firm commitment of the United States to the protection of threatened and endangered species, including sea turtles.

64 Fed.Reg. at 14,481. This notice then summarized the findings of the Appellate Body report and offered responses on the part of the United States as follows:

> (1) *WTO Finding*: While Section 609 requires as a condition of certification that foreign programs for the protection of sea turtles in the course of shrimp trawl fishing be *comparable* to the U.S. program, the practice of the Department of State in making certification decisions was to require foreign programs to be *essentially the same* as the U.S. program. In assessing foreign programs, the Department ... should be more flexible in making such determinations and, in particular, should take into consideration*1008 different conditions that may exist in the territories of those other nations.
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> *Analysis*: ... [T]he proposed revisions to the guidelines make clear that the Department of State will fully consider any evidence that another nation may present that its program to protect sea turtles in the course of shrimp trawl fishing is comparable to

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[4] 64 Fed.Reg. 14,481 (March 25, 1999) [referred to hereinafter as "March 1999 Notice of Revisions"].

the U.S. program. In reviewing such evidence, the Department will take into account any demonstrated differences in foreign shrimp fishing conditions, to the extent that such differences may affect the extent to which sea turtles are subject to capture and drowning in the commercial shrimp trawl fisheries. The Department will also take such differences into account in making related determinations under Section 609.

(2) *WTO Finding*: The certification process under Section 609 is neither transparent nor predictable and denies to exporting nations basic fairness and due process. There is no formal opportunity for an applicant nation to be heard or to respond to arguments against it. There is no formal written, reasoned decision. But for notice in the Federal Register, nations are not notified of decisions specifically. There is no procedure for review of, or appeal from, a denial of certification.

Analysis: ... [T]he proposed revisions to the guidelines institute a broad range of procedural changes in the manner in which the Department of State will make certification decisions under Section 609. The intention is to create a more transparent and predictable process for reviewing foreign programs and for making decisions on certifications and other related matters. The proposed revisions ensure that the governments of harvesting nations will be notified on a timely basis of all pending and final decisions and are provided a meaningful opportunityto be heard and to present any additional information relevant to the certification decision. The governments of harvesting nations that are not granted a certification shall receive a full explanation of the reasons that the certification was denied. Steps that the government must take to

receive a certification in the future shall be clearly identified....

(3) *WTO Finding*: At the time the WTO complaint arose, the United States did not permit imports of shrimp harvested by vessels using TEDs comparable in effectiveness to those used in the United States, unless the harvesting nation was certified pursuant to Section 609. In other words, shrimp caught using methods identical to those employed in the United States had been excluded from the United States market solely because they had been caught in waters of uncertified nations.

Analysis: ... [T]he Department of State modified its implementing Guidelines on August 28, 1998 to allow the importation of shrimp harvested by vessels using TEDs, even if the exporting nation is not certified pursuant to Section 609. This policy had, in fact, been in place as of April 19, 1996, but had been overturned by a domestic court ruling that was subsequently vacated. The provisions of the August 28, 1998 Guidelines pertaining to the importation of such shrimp remain in effect.

(4) *WTO Finding*: The United States failed to engage the nations that brought the complaint, as well as other WTO Members exporting shrimp to the United States, in serious across-the-board negotiations, apart from negotiations on the Inter-American Convention for the Protection and Conservation of Sea Turtles, for the purpose of concluding agreements to conserve sea turtles before enforcing the import prohibition on those other Members.

Analysis: As early as 1996, the United States proposed to governments in the Indian Ocean region the negotiation of an agreement to protect sea turtles in *1009 that region, but received no positive

response. In 1998, even before the WTO Appellate Body issued its report, the United States reiterated its desire to enter into such negotiations with affected governments, including those that had brought the WTO complaint. During the summer of 1998, the United States informally approached several governments in the Indian Ocean region, as well as numerous non-governmental organizations, in an effort to get such negotiations underway. On October 14, 1998, following the issuance of the Appellate Body report, but before its adoption by the DSB, the Department of State formally renewed this proposal to high-level representatives of the embassies of the four complainants in Washington, D.C., and delivered the same message to a wide range of nations in the Indian Ocean region through ... embassies abroad. In each case, the United States presented a list of "elements" that ... could form the basis of such an agreement ... [and] made clear the willingness of the United States to support the negotiating process in a number of ways....

(5) *WTO Finding*: As compared to the 14 nations of the Caribbean and western Atlantic that were initially affected by Section 609, the United States provided less technical assistance to those nations that first became affected by the law at the end of 1995 as a result of the decision of the U.S. Court of International Trade.

Analysis: The United States has renewed, and hereby reiterates, its offer of technical training in the design, construction, installation and operation of TEDs to any government that requests it. Any government that wants to receive such training need only make such a request to the United States in writing, through diplomatic channels. The United States will make every effort to meet such requests. Training programs will be scheduled on a first

> come, first served basis, although special efforts will be made to accommodate nations whose governments are making good faith efforts to adopt and maintain nation- wide TEDs programs and who have not previously received such training. In this way, the United States hopes to create an additional incentive in favor of such programs.

Id. at 14,481-82 (emphasis in original).

Nonetheless, this court was constrained to conclude in slip op. 99-32 yet again that paragraph (1) of section 609(b) is specifically contingent upon the certification procedure established by section 609(b)(2), which offers the only congressionally-approved breaches of the embargo, either via subparagraphs (A) and (B) or through (C). Paragraphs (b)(1) and (b)(2) are *pari materia*; they cannot be read independently, or out of the context adopted by Congress, including section 609(a), to slow or stanch the extinction of species of sea turtles. And so long as the U.S. government reports that the "foundation of the U.S. program" continues, with "limited exceptions", to be that "all other commercial shrimp trawl vessels operating in waters subject to U.S. jurisdiction in which there is a likelihood of intercepting sea turtles must use TEDs at all times", the catch of vessels equipped with TEDs from nations without such comparable foundation continues subject to embargo.[5] Whereupon the court held in slip op. 99-32 that the part of the 1998 Revised Guidelines which constituted the decision to permit the importation of TED-caught shrimp from uncertified *1010

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[5] 23 CIT at ----, 48 F.Supp.2d at 1081, quoting the 1998 Revised Guidelines, 63 Fed.Reg. at 46,095. *See* March 1999 Notice of Revisions, 64 Fed.Reg. at 14,482:

> The commercial shrimp trawl fisheries in the United States in which there is a likelihood of intercepting sea turtles occur in the temperate waters of the Gulf of Mexico and the Atlantic Ocean from North Carolina to Texas. With very limited exceptions, all U.S. commercial shrimp trawl vessels operating in these waters must use approved TEDs at all times and in all areas.

nations, on its face, was not in accordance with section 609. But it also decided that, before any entry of judgment on plaintiffs' motion herein, the court would await defendants' annual report to Congress pursuant to section 609(b)(2), their report to the court on any responses to their March 1999 Notice of Revisions, and the presentment of evidence regarding the actual enforcement of the 1998 Revised Guidelines, as well as of guidelines in effect between April and November of 1996.[6]

A

Since issuance of slip op. 99-32, the defendant(s) have reported to Congress on or about May 1st of 1999 and of 2000, as required by section 609.[7] Among other things, Congress was reassured that, with certain "limited exceptions", the foundation of the U.S. program continues to be that all commercial shrimp trawl vessels operating in waters subject to U.S. jurisdiction in which there is a likelihood of intercepting sea turtles use TEDs at all times.[8]

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[6] 23 CIT at ----, 48 F.Supp.2d at 1081, referring to Dep't of State, *Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations*, 61 Fed.Reg. 17,342 (April 19, 1996).

[7] *See* Defendants' Response to Court Order of April 2, 1999, Declaration of David A. Balton (July 1, 1999) [hereinafter "1999 Balton Declaration"], Tab A, first three pages; Defendant's Response to the Court's Instructions of April 4, 2000, Attachment 1.

[8] 1999 Balton Declaration, Tab A, first two pages; Defendant's Response to the Court's Instructions of April 4, 2000, Attachment 1, pp. 1-2.

In 1999, twelve nations were initially certified as having comparable regulatory programs. Panama and Costa Rica and then Guyana were added to that list. *Compare* 1999 Balton Declaration, Tab A, second and third pages *with id.*, fourth to seventh pages. This year, 16 nations, including the foregoing three, have been certified. *See* Defendant's Response to the Court's Instructions of April 4, 2000, Attachment 1, pp. 2-3; Dep't of State, *Bureau of Oceans and Int'l Environmental and*

The defendants have also reported to the court via declarations of the Director of the Office of Marine Conservation, U.S. Department of State, David A. Balton, dated July 1, 1999 and May 1, 2000[9], and of the Director, Trade Programs, U.S. Customs Service Office of Field Operations, Elizabeth G. Durant. The latter transmits copies of instructions issued by Customs between May 1995 and June 1999 to its Regional, District, Area, and Port Directors regarding enforcement of the embargo established by Congress in section 609. Director Durant produces a copy of the State Department's *Shrimp Exporter's/Importer's Declaration*, Form DSP-121, and attests that shrimp imports from all harvesting nations must be accompanied by the form. In the case of shipments from countries not certified by the Department in accordance with the statute, the form must be "signed by an exporter and harvesting government official." Durant Declaration, para. 2. *See id.*, Attachment A. On the other hand, [i]mports from harvesting nations which have been certified by the State Department as utilizing an acceptable method of shrimp/prawn harvesting are required to be accompanied by a completed DSP-121 signed by the exporter, and the importer is required to maintain this form for five years in accordance with Customs record keeping requirements. These entries are subject to later DSP-121 form verification by Customs and/or State Department.

Id., para. 4. On his part, Director Balton produces copies of Department of State correspondence relevant to the period April--November 1996. *See generally* 1999 Balton Declaration, para. 5 and Tab C. Tab B thereto is a copy of the Department's original Public Notice 3086, which *1011 sets forth the responses to its March 1999 Notice of Revisions,

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Scientific Affairs; Certifications Pursuant to Section 609 of Public Law 101-162, 65 Fed.Reg. 25,785 (May 3, 2000).

[9] As with the Director's earlier declaration, this later one will be cited by this year alone.

and which has been published *sub nom. Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*, 64 Fed.Reg. 36,946 (July 8, 1999). It reports a total of eleven responses, five from governments or their agencies, including Australia, India, Malaysia and Thailand, with the remainder submitted by nongovernmental or environmental organizations and an individual, at least one of which is a named party plaintiff herein. While reiterating that the March 1999 Notice of Revisions sought public reaction to those aspects of the WTO decision that were intended to be addressed through the proposed changes to the guidelines, as set forth in sections II and III of that notice[10], the Department reports the governments and organizations that submitted comments did not limit those comments to Sections II and III .... Instead, many ... responded to other parts of the notice, particularly to the current policy of permitting importation of shrimp harvested by vessels equipped with ... TEDs[ ] in uncertified nations, for which the Department proposed no change.

64 Fed.Reg. at 36,946. *See also id.* at 36,948. And it responded to those particular comments as follows:

> The Department of State recognizes the strongly held views on all sides of this issue, and notes that the issue is also the subject of on-going litigation before the U.S. Court of International Trade. In light of these circumstances, the Department has determined that it will make no change to the current policy at this time.

Id. Following its responses to the comments received, the Department states:

> For the sake of clarity, the August 28, 1998 guidelines are restated below as modified to reflect the changes proposed in the Federal Register notice

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[10] 64 Fed.Reg. at 36,946.

> issued March 25, 1999, and the comments received on those proposed changes.

Id. at 36,949 (bold typeface in original). *See generally id.* at 36,949-52.

Whatever the modifications, the court takes note that these guidelines, issued in 1998 and reissued in 1999, continue to inform the world that the foundation of the U.S. program, as described above, remains in effect. *Compare* 64 Fed.Reg. at 36,949, § I(A) *with* 1998 Revised Guidelines, 63 Fed.Reg. at 46,095, cols. 2-3. However, each issuance also continues the following stated approach, albeit not entirely *in haec verba*:

> *Shrimp Harvested in a Manner Not Harmful to Sea Turtles*. The Department prohibitions imposed pursuant to Section 609 do not apply to shrimp or products of shrimp harvested under the following conditions, since such harvesting does not adversely affect sea turtles:
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> * * * * * *
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> Shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States....

63 Fed.Reg. at 46,096. *Cf.* 64 Fed.Reg. at 36,949, § I(B).

(1)

This approach remains at the core of this case and controversy. According to the submissions to date herein, shrimp shipments from only one nation, Brazil, have been granted U.S. entry pursuant to the foregoing, published Department determination. Director Balton reports as follows thereon:

> 6. Brazil remains the only nation not certified under Section 609 that is exporting shipments of TED-caught shrimp to the United States.... Brazil has two shrimp fisheries that are separated by hundreds of

miles (one in the north, one in the south). *1012 Although Brazilian law requires all commercial shrimp trawl vessels to use TEDs, evidence continues to indicate that the law is only being adequately enforced in the northern shrimp fishery. This situation arose well before August 1998,when the Department reinstated the policy at issue in this case.

7. Brazil remains uncertified today because of inadequate enforcement of its TEDs rules in its southern fishery. Until such time as Brazil is eligible to be certified, the policy of the Department is to permit imports of shrimp harvested in its northern fishery, provided that the Government of Brazil continues to enforce its TEDs rules in its northern fishery and maintains a system to segregate TED-caught shrimp harvested in its northern fishery from other shrimp harvested in its southern fishery.

8. However, Brazil has recently taken an important step toward certification. Brazil recently ratified the Inter-American Convention for the Protection and Conservation of Sea Turtles, which requires comprehensive use of TEDs. Although the Convention is not yet in force, it should enter into force by the end of this year. At that point, the United States will be in a much stronger position to press the Government of Brazil to achieve and maintain adequate enforcement of its TEDs rules in both of its shrimp fisheries. If that happens, Brazil will be eligible for certification under Section 609.[11]

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[11] 2000 Balton Declaration, pp. 2-3. See also 1999 Balton Declaration, Tab C (Dep't of State Action Memorandum, *Status of Shrimp Imports from Brazil under Section 609 of Public Law 101-162* (Dec. 18, 1998)); (Report on Trip to Brazil (Oct. 27-29, 1998)).

The stance of the Customs Service with regard to Brazil, and to other countries not certified pursuant to section 609, is stated to be:

He also reports, however, that the federal government of Australia began as of April 15, 2000 requiring TEDs in its northern prawn fishery in order to gain access to the U.S. market for catch therefrom, based upon the foregoing, contested Department determination. That is,

> [d]espite the requirement to use TEDs in this large fishery, Australia is not yet eligible for certification under Section 609, due to the fact that the Commonwealth, State and Territorial Governments in Australia, which regulate shrimp fisheries in other areas, do not yet require TEDs use.[12]

Whereupon the declarant opines:

> ... Based on discussions with Australian officials, it is my belief that, were the Department to deny importation of shrimp from the northern prawn fishery, we would weaken Australia's commitment to use TEDs in this large fishery.
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> 2000 Balton Declaration, para. 11.

Be that as it may, Director Balton, in reporting on the status of negotiations with the governments in the Indian Ocean region for an agreement along the lines of the Inter-American Convention for the Protection and Conservation of

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While Brazil is not a certified nation, the State Department has determined that Brazil conducts some commercial shrimp fishing operations using TEDS. Therefore, imports of shrimp, prawns and products thereof from Brazil may be released from Customs custody if the entry is accompanied by a DSP-121 with block 7(2) checked, indicating that the shrimp has been harvested using TEDs. Shrimp/prawn entries from any other uncertified nation accompanied by a form DSP-121 with block 7(2) checked constitute improper claims. These shipments are not released from Customs custody and are prohibited from entry into the commerce of the United States.

Durant Declaration, para. 3.

[12] 2000 Balton Declaration, para. 10, pp. 3-4. *Cf. Determination by the Department of State Regarding Shrimp Imports From the Spencer Gulf in Southern Australia*, 64 Fed.Reg. 57,921 (Oct. 27, 1999).

Sea Turtles *1013[13] and on the aftermath of the WTO proceedings, claims to be able to still confirm that no foreign government that had previously established a nation-wide TEDs program has abandoned or limited such program in favor of exporting TED-caught shrimp to the United States in the absence of such a national program.

Id., para. 3.

The intervenor-defendant National Fisheries Institute, Inc. ("NFI"), which is a "national trade association ... [of] approximately 1,000 member companies involved in the United States fish and seafood industry"[14], also reports that, as far as it is aware,

> Brazil has been the only uncertified nation shipping shrimp harvested by mechanized trawl vessels equipped with Turtle Excluder Devices ("TEDs") to the United States.

Intervenor-Defendant's Response to the Court's Order of April 2, 1999. Submitted with this response were reports sworn to by representatives of two NFI members which declare importation of shrimp caught by such vessels in 1996 and since August 1998. They attach copies of the forms that allegedly accompanied some of those firms' shipments during those periods.

The court has perused each of them. Those appended to the Declaration of Claude Schoeffer appear to be, as attested, copies of executed Department of State forms DSP-121, which he claims his company maintains on file for at least five years. The declaration on behalf of the second NFI member, Harbor Seafood, Inc., New Hyde Park, New York, also claims a similar retention policy and purports to present copies of "fully executed DSP-121s, signed by the exporter

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[13] *Done* Dec. 1, 1996 at Caracas, Venezuela, S. Treaty Doc. No. 105-48 (1998).

[14] Declaration of Richard E. Gutting, Jr., para. 2 (Sept. 22, 1998).

and a responsible government official,"[15] but none actually is such. While each resembles the prescribed U.S. State Department document in terms of format and content, each, on its face, is a document issued in the name of the Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis--IBAMA, which apparently is a governmental agency of Brazil.[16] Indeed, the primary language on these exhibits is Portuguese, albeit with a secondary English translation provided. The prescribed DSP-121 *Shrimp Exporter's/Importer's Declaration* contains a check-box in part 7 labelled "Harvested in the waters of a nation currently certified pursuant to Section 609 of P.L. 101-162"[17], whereas the IBAMA would-be equivalent checkpoint has the written annotation *Capturado em águas de uma região atualmente certificada de acordo com a Seção 609 da P.L. 101-162*, which is translated on the form as "Harvested in the waters of a region currently certified pursu ...." E.g., Declaration of Douglas Deerin (July 1, 1999), Tab A, first sheet (05/20/1996) (emphasis added). Of course, as this court held in this case's precursor, CIT No. 94-06-00321, section 609 does not contemplate *region* al certification, nor have the defendants attempted to renew any such transmogrification since then. Finally, the court notes in passing that the first two copies comprising declarant Deerin's Tab A show as the U.S. importer/ultimate consignee a Long Shore Sea Food Co of Panama City, presumably in Florida[18], as opposed *1014 to New Hyde Park or elsewhere in the hemisphere.

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[15] Declaration of Douglas Deerin, para. 4, p. 2 (July 1, 1999). *See* Declaration of Claude Schoeffer, para. 4, p. 2 (July 1, 1999).

[16] *Cf.* 1999 Balton Declaration, Tab C (Report on Trip to Brazil (Oct. 27-29, 1998)).

[17] *See, e.g.*, Durant Declaration, Attachment A (emphasis added).

[18] In fact, all of the Tab B exhibits to the Declaration of Claude Schoeffer specify a firm in that state instead of his company, Expack Seafood, Inc. of Edison, New Jersey, as the actual U.S. importer.

B

On their part, the plaintiffs reaffirm that their objective in initiating th[is] lawsuit [h]as [been] to prohibit the government from implementing a "shipment by shipment" approval process for the importation of TED-caught shrimp and shrimp products from uncertified nations, in direct contravention of the plain terms and purpose of the Turtle Law.[19]

Plaintiff Steiner, the experienced Director of the Sea Turtle Restoration Project[20] of the plaintiff Turtle Island Restoration Network, takes issue with the above-stated views of State Department Director Balton, in part, as follows:

> 5. First, ... the government's interpretation and implementation of Section 609 to allow the importation of individual shipments of wild-caught shrimp and shrimp products from uncertified nations, aside from being contrary to the law, will lead to weakened protections for endangered sea turtles. I base this opinion on my past experience in dealing with various nations on this issue. Mr. Balton's assertion that to date no nations have abandoned a national certification program in favor of a shipment-by-shipment certification program[ ] is not proof that nations ultimately will not abandon national standards in the future. Indeed, since this case is still in litigation, and particularly in light of the Court's April 2, 1999 ruling, nations desiring to sell shrimp in the United States would not revert to

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[19] Declaration of Todd Steiner in Support of Plaintiffs' Application for Attorneys' Fees, Costs and Expenses, para. 9, p. 3 (May 2, 2000).

[20] The court notes in passing that the record of this case, and of its predecessor case, CIT No. 94-06-00321, reflects cooperation by this Project with the U.S. government in various sea-turtle-related endeavors around the world. *See, e.g.*, Declaration of Todd Steiner in Response to Declaration of David A. Balton, paras. 10(a), 10(b) (May 5, 2000).

the weaker shipment-by- shipment import standards, since legal uncertainty over their validity remains.

6. Also, ... maintaining a shipment-by-shipment importation policy will do little to encourage nations to consistently enforce domestic laws protective of sea turtles. For instance, Brazil has a national law requiring the use of TEDs on its shrimp fleet for both the Northern and Southern fisheries. Yet, Brazil has failed to enforce that law in the Southern fishery .... The U.S. State Department's current shipment-by-shipment Guidelines provide no incentive for Brazil to commence nationwide enforcement. To the contrary, by allowing Brazilian shrimp to be exported to the United States, the State Department has reduced the incentives for Brazil to fully enforce its own law, resulting in the unnecessary deaths of endangered sea turtles. Congress never intended for nations such as Brazil to profit from access to the lucrative U.S. market while still failing to maintain protections for sea turtles in its entire fleet that are comparable to the protections required of the U.S. fleet. Ratification of the Inter-American Treaty ... does not alter Congress' intent that countries be certified under U.S. law nor ... does it provide the strongest mechanism by which to press Brazil to adopt nationwide standards.

7. I further disagree with Mr. Balton's assertion that a return to nationwide standards, as opposed to maintenance of the shipment-by-shipment standard, will precipitate a WTO challenge. In fact, the likelihood of such a challenge is the same under either interpretation of the Guidelines. For instance, it is my understanding that Malaysia is planning to challenge the current shipment- by-shipment implementation of the State Department's *1015

Guidelines, and merely is waiting for Congress to vote for the renewal of its membership in the WTO.

8. I also believe that Mr. Balton's opinion that the Indian Ocean agreement might be jeopardized by a return to nationwide standards is unfounded. First, there is no Indian Ocean agreement, only a broad consensus among nations to begin discussing such an agreement. Secondly, even if eventually a formal agreement is entered into, there is no guarantee that it will address TEDs or include enforcement mechanisms relating to their use, or even that it will ever be ratified. To the extent that Mr. Balton believes such an agreement will be jeopardized by further WTO proceedings, the fault should not lie with the enforcement of nationwide standards. Rather, as stated above, Malaysia plans to challenge the United States' implementation of the WTO decision despite the adoption of shipment-by-shipment importation policy. Lastly, it is worth noting that negotiations toward the conclusion of the Inter-American Agreement were commenced during the time when nationwide standards were in force, yet were not hindered by that policy.

9. Mr. Balton also states that Australia's prime motivation for placing TEDs on some of its shrimp vessels was to gain access to the U.S. market. Yet, by allowing Australia to import shrimp into the United States on a shipment-by- shipment basis, the government has eliminated any incentive for Australia to ensure that all of the vessels in its fleet use TEDs. As matters currently stand, only about half of Australia's vessels use TEDs, and sea turtles that migrate along the coast between Australia's fisheries continue to drown needlessly in shrimp nets.

Declaration of Todd Steiner in Response to Declaration of David A. Balton (May 5, 2000).

Prior to this submission, plaintiffs' counsel had responded that defendants' claim that the use of TEDs in Brazil's northern fishery provides significant environmental benefit is an illusory argument ... as use of TEDs in the north only saves these migratory turtles so that they can die in Brazil's southern fishery, where no TEDs are used.... Nor have Defendants independently verified that shrimp from the south do not end up in exports to the United States. Pre-announced inspections in the north ... simply lead to installation of new TEDS to create an appearance of compliance where none exists.

Letter from Joshua R. Floum, Esq., first page (July 21, 1999). Submitted in support of this response is an eleven-page document *sub nom. Sea Turtles of Brazil* (June 1999), including extensive bibliography and a map of the fisheries along the considerable coastline of that country, attributed to Randall Arauz, Director, Latin American Program of the Sea Turtle Restoration Project. The Executive Summary is stated to be:

> Five species of sea turtles occur in both the North and South coast ofBrazil. Available evidence from tag returns and genetic studies suggests that individual turtles move between these two regions. While the shrimp fisheries occurring in the North and South of Brazil may be distinct, the sea turtles found off the coast of Brazil move through both these regions in their annual migrations. In addition, Brazil may be an important foraging area for sea turtles that nest in several nations other than Brazil.

In addition to reporting in detail on the nature of those particular species, namely, green turtle (*Chelonia mydas*), hawksbill (*Eretmochelys imbricata*), leatherback (*Dermochelys coriacea*), loggerhead (*Caretta caretta*), and

olive ridley (*Lepidochelys olivacea*), each of which is considered "endangered" and/or "threatened" within the meaning of the U.S. Endangered Species*1016 Act[21], and also reporting on their incidental captures by artisinal fishing, purse seine nets, or long lines targeting sharks, tuna or swordfish, the author refers to a study regarding strandings and briefly to industrial shrimping activities. As to that last phenomenon, in Brazilian waters as well as elsewhere, plaintiffs' counsel further contends that troubling enforcement issues remain worldwide. The DSP-121 form remains in the hands of importers. Customs does not have a list of accepted signatures of foreign government officials, to guard against widespread forgery. The actual source of individual shrimp shipments is even harder to ascertain, and is another reason to reject the shipment-by-shipment guidelines.

Letter from Joshua R. Flom, Esq., first page (July 21, 1999).

II

Section 609 is part of the Endangered Species Act. Nonetheless, in the predecessor case to this one, CIT No. 94-06-00321, the Court of Appeals for the Federal Circuit read *Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997), to mean that that act "does not authorize, and cannot support, an award of [attorneys'] fees" in this matter. Earth Island Institute v. Albright, 147 F.3d 1352, 1357 (Fed.Cir.1998). Whereupon, after remand of that proceeding, this court approved such an award to the plaintiffs under EAJA. *See Earth Island Institute v. Albright*, 22 CIT ----, Slip Op. 98-151 (Nov. 4, 1998).

Relying, as indicated above, on that latter enactment, come now the plaintiffs with an application on CIT Form 15

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[21] 16 U.S.C. § 1531 *et seq.* *Compare* 50 C.F.R. § 223.102(d) (1999) *with id.*, § 224.101(c). *See also Earth Island Institute v. Christopher*, 19 CIT 812, 815, 890 F.Supp. 1085, 1088-89 (1995).

for an award herein of fees for their attorneys in the amount of $162,066.25, plus related expenses of $3,960.18. The defendants take the position that the facts and circumstances of this case do not satisfy the standards set by EAJA for such an award. They argue that the plaintiffs are not "prevailing parties" herein; that, if the court were to hold otherwise on that threshold issue, the government's position is and has been "substantially justified"; and that, if not so justified, any award should be limited due to "deficiencies" in plaintiffs' application as presented.[22] The sections of the statute thus implicated are as follows:

> (d)(1)(A) ... [A] court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action ..., including proceedings for judicial review of agency action, brought ... against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
>
> (B) A party seeking an award of fees and other expenses shall ... submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other

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[22] *See, e.g.*, Defendants' Opposition to Fees, p. i. Those deficiencies are alleged to include failure to justify an hourly attorney's rate higher than $125; failure to demonstrate any special factor warranting more than that statutory amount for time spent preparing the EAJA application itself; and improper claims for activities undertaken by a legal assistant or unrelated to this case. *See generally id.* at 21-28.

expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether *1017 or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

* * * * * *

(2) For the purposes of this subsection -

(A) ... (The amount of fees awarded ... shall be based upon prevailing market rates for the kind and quality of the services furnished, except that ... (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code ... may be a party regardless of the net worth of such organization or cooperative association ...;

> (C) "United States" includes any agency and any official of the United States acting in his or her official capacity;
>
> (D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; ...[23]

A

The application at bar shows, and the court finds, that, with the exception of the Sierra Club[24], each of the plaintiffs named in the caption hereto is a "party" within the meaning of the foregoing statute. Other than a case of eminent domain, however, EAJA does not define "prevailing" party, which issue has thus been left to the courts. In *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), the Supreme Court pointed out that the standard for making this threshold determination has been framed in various ways. A typical formulation is that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."[25] ... This is a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the district court to determine what fee is "reasonable."

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[23] 28 U.S.C. § 2412(d). As stated, costs can also be awarded to the prevailing party pursuant to subsection 2412(a).

[24] *See* Plaintiffs' Application for Attorneys' Fees, Costs and Expenses, p. 7, n. 4 ("Sierra Club is not a 'party' under EAJA's definition").

[25] Quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir.1978), and citing *Busche v. Burkee*, 649 F.2d 509 (7th Cir.) *cert. denied*, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981); *Taylor v. Sterrett*, 640 F.2d 663 (5th Cir.1981); *Sethy v. Alameda County Water Dist.*, 602 F.2d 894 (9th Cir.1979), *cert. denied*, 444 U.S. 1046, 100 S.Ct. 734, 62 L.Ed.2d 731 (1980).

This approach has been followed by the Federal Circuit, *e.g., Singer v. Office of the Senate Sergeant at Arms*, 173 F.3d 837, 841 (Fed.Cir.1999), and by the Court of International Trade, *e.g.*, *1018*Former Employees of Shaw Pipe, Inc. v. U.S. Sec'y of Labor*, 22 CIT ----, ----, 9 F.Supp.2d 713, 715 (1998).

To follow it yet again in this case leads the court to conclude without reservation that the plaintiffs have *prevailed* on the threshold issue of whether defendants' approach to shipments to this country of shrimp snagged by trawls equipped with TEDs through the waters of nations not formally certified to Congress by the State Department under section 609 violates that statute on its face. This court has opined that it does, has granted plaintiffs' motion for summary judgment thereon, and will so declare in the final judgment entered herewith.

B

To the extent any party to this controversy, genuinely, has not understood the timing of this finalization herein, suffice it to recite now from the pledge published as part of the original object of plaintiffs' complaint, the 1998 Revised Guidelines, to wit:

> The Department of State will engage in ongoing consultations with harvesting nations. The Department recognizes that, as turtle protection programs develop, additional information will be gained about the interaction between turtle populations and shrimp fisheries. These Guidelines may be revised in the future to take into consideration that and other information, as well as to take into account changes in the U.S. program.
>
> In addition, the Department seeks public comment on the best ways to implement both these guidelines and Section 609 as a whole and may revise these guidelines in the future accordingly.

63 Fed.Reg. at 46,097. In other words, the defendants needed sufficient opportunity to contemplate and to exercise their considerable discretion, to report thereon to the Congress, and to duly advise, if not coordinate with, the rest of the affected world of international trade. At the same time, the plaintiffs would be afforded adequate chance to bear witness to that application of presidential prerogatives, and to consider or reconsider their position thereon. Moreover, while that position had been that the defendants be enjoined immediately from relying on that part of their guidelines which is violative of section 609 on its face, the decision of whether or not to grant such equitable relief, which is truly extraordinary in the field of America's foreign affairs[26], required evidence not available at the time slip op. 99-32 was handed down.

Most of the evidence submitted since then, such as it is, appears or is referred to in part I, *supra*. The essence of plaintiffs' position remains that defendants' misinterpretation of the statute requires that an injunction issue without any further ado. *See, e.g.*, Letter from Joshua R. Floum, Esq. (Jan. 5, 2000). But their application for fees and expenses requires the court to now revisit the merits of their case anyway to determine whether or not the position of the United States is "substantially justified".

Again, Congress has not defined that controlling standard in EAJA; courts have had to do so. Both sides refer this court to *Pierce v. Underwood*, 487 U.S. 552, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988), and *Gavette v. Office of Personnel Management*, 808 F.2d 1456 (Fed.Cir.1986). In the first matter, the opinion of the Supreme Court states:

> We are of the view ... that as between the two commonly used connotations of the word "substantially," the one most naturally conveyed by

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[26] *See generally Crosby v. Nat'l Foreign Trade Council*, 530U.S. 363, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000), and cases cited therein.

> the phrase before us here is not "justified to a high degree," but rather "justified in substance or in the main"--that is, justified to a degree that could satisfy a reasonable person. That is no different from *1019 the "reasonable basis both in law and fact" formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue.... To be "substantially justified" means, of course, more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve.

487 U.S. at 565-66, 108 S.Ct. 2541 (footnote omitted), citing *United States v. Yoffe*, 775 F.2d 447 (1st Cir.1985); *Dubose v. Pierce*, 761 F.2d 913 (2d Cir.1985); *Citizens Council of Delaware County v. Brinegar*, 741 F.2d 584 (3d Cir.1984); *Anderson v. Heckler*, 756 F.2d 1011 (4th Cir.1985); *Hanover Building Materials, Inc. v. Guiffrida*, 748 F.2d 1011 (5th Cir.1984); *Trident Marine Construction, Inc. v. District Engineer*, 766 F.2d 974 (6th Cir.1985); *Ramos v. Haig*, 716 F.2d 471 (7th Cir.1983); *Foster v. Tourtellotte*, 704 F.2d 1109 (9th Cir.1983); *United States v. 2,116 Boxes of Boned Beef*, 726 F.2d 1481 (10th Cir.), *cert. denied sub nom. Jarboe-Lackey Feedlots, Inc. v. United States*, 469 U.S. 825, 105 S.Ct. 105, 83 L.Ed.2d 49 (1984); *Ashburn v. United States*, 740 F.2d 843 (11th Cir.1984). In *Gavette*, the Court of Appeals for the Federal Circuit had opined that "substantial justification" requires that the

> Government show that it was *clearly* reasonable in asserting its position ... in view of the law and the facts. The Government must show that it has not "persisted in pressing a tenuous factual or legal position, albeit one not wholly without foundation." It is not sufficient for the Government to show merely "the existence of a colorable legal basis for the government's case."

808 F.2d at 1467 (emphasis in original), citing *Schuenemeyer v. United States*, 776 F.2d 329 (Fed.Cir.1985), and quoting *Gava v. United States*, 699 F.2d 1367, 1375 (Fed.Cir.1983).

Whatever the precise definition, given the facts and circumstances of this case, which obviously transcend purely domestic concerns, this court is unable to conclude that the government's position currently is not substantially justified. As the Supreme Court noted in *Underwood*, 487 U.S. at 566, n. 2, 108 S.Ct. 2541:

> ... [A] position can be justified even though it is not correct, and we believe it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.

III

The court's inability means not only that plaintiffs' application for any award of fees etc. cannot be granted, the motion for injunctive relief based upon the declaratory judgment in their favor must also be denied. Clearly, the intent of section 609 is and has been to help prevent the extinction of sea turtles wherever they exist on Earth. The government professes continuing commitment to this goal, consistent with both its national and other, *inter* national obligations. And the plaintiffs have not proven that this goal is being drowned now by vessel-specific shipments of shrimp from Brazil (or any other uncertified nation). Indeed, the overall record of this matter reflects that Brazil not only has a national regulatory program governing the incidental taking of endangered turtle species during harvesting of shrimp in the wild that is comparable to that of the United States, it has been duly certified to Congress under section 609(b)(2)(A) and (B) from time to time.[27] To the extent that Brazil has not

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[27] *See* Slip Op. 99-32, 23 CIT ---- and 48 F.Supp.2d at 1079, n. 33. Then again, unfortunately, it must be recognized that section 609

been so certified this year, the reason given is "its inadequate *1020 enforcement of its TEDs rules in its southern fishery", to quote Director Balton, *supra*. Nevertheless, the best evidence the plaintiffs have produced is the report of their Latin American Program Director Arauz *viz. Sea Turtles of Brazil*, p. 6 (June 1999):

> Industrial Shrimping activities. In the north and southern fishing regions pink shrimp is targeted (Penaeus paulensi, P. Brasileinsi and P. Subtilis) at about 50 ms of depth. In the Northeast and Southeast the seven keel shrimp (Xiphopenaeus kroyeri) are captured. This fishery is carried out right in front of important nesting beaches. According to interviews with fishermen, after 1500 hours of shrimping activities, only two turtles were captured (CPUE = 0.0013/hour). However, this figure is not reliable because captains deliberately do not record sea turtle captures. TEDs are required by all shrimping vessels in Brazil, but no control exists, and fishermen in general are against the use of this technology ....
>
> In spite of the fact that shrimping induced mortality is considered low and not important, other Brazilian biologists are concerned about the fate of the olive ridleys that nest in the state of Sergipe, the only nesting site for ridleys in Brazil. Shrimpers reportedly cause death to nesting adult turtles....

This report, standing essentially on its own, hardly supports a permanent injunction against the government of the United States. *Cf. Defenders of Wildlife v. Dalton*, 24 CIT ----, ----, 97 F.Supp.2d 1197, 1200 (2000)("argument

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certification of certain countries following prior orders of the court, *e.g.*, Costa Rica (Pacific fleet), is not proving to be a panacea for the worldwide problem. *See, e.g.*, Fountain, *Sea Turtles Nearing Extinction in Pacific, Study Says*, N.Y. Times, June 1, 2000, at A18 ("Fishing practices are blamed for sharp decline").

that irreparable injury is presumed in environmental cases is unavailing"). As this court once was constrained to caution plaintiffs' counsel in their predecessor case, *Earth Island Institute v. Christopher*, 19 CIT 1262, 1264 (1995), as well as lawyers from time in other actions, *e.g., Avanti Products, Inc. v. United States*, 16 CIT 453, 453-54 (1992); *Teletronics Pacing Systems, Inc. v. United States*, 20 CIT 393, 394 (1996); *Citrus World, Inc. v. United States*, 21 CIT 1078, 1078 (1997), *appeal dismissed*, 185 F.3d 878, 1998 WL 968460 (Fed.Cir.1998); *Napp Systems, Inc. v. United States*, 22 CIT ----, ----, 1998 WL 892095 at * 2 (Dec. 14, 1998):

> ... [A] party plaintiff has a primary and independent obligation to prosecute any action brought by it--from the moment of commencement to the moment of final resolution. That primary responsibility never shifts to anyone else and entails the timely taking of all steps necessary for its fulfillment.

IV

In sum, while the plaintiffs have persuaded this court to grant declaratory relief, they have not borne their burden with regard to any of the other relief for which they pray. Final judgment will enter accordingly.

APPENDIX C

UNITED STATES COURT OF
INTERNATIONAL TRADE

EARTH ISLAND INSTITUTE, A CALIFORNIA NONPROFIT CORPORATION; TODD STEINER; THE AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, A NEW YORK NONPROFIT CORPORATION; THE HUMANE SOCIETY OF THE UNITED STATES, A DELAWARE NONPROFIT CORPORATION; AND THE SIERRA CLUB, A CALIFORNIA NONPROFIT CORPORATION,

Plaintiffs,

v.

WILLIAM M. DALEY, SECRETARY OF COMMERCE; MADELEINE ALBRIGHT, SECRETARY OF STATE; ROBERT E. RUBIN, SECRETARY OF TREASURY; MELINDA KIMBLE, ACTING ASSISTANT SECRETARY OF STATE FOR THE BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS; ROLLAND A. SCHMITTEN, ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL MARINE FISHERIES SERVICE; AND STUART E. EIZENSTAT, UNDER SECRETARY OF STATE FOR ECONOMIC, BUSINESS AND AGRICULTURAL AFFAIRS,

Defendants,

and

NATIONAL FISHERIES INSTITUTE, INC.,

Intervenor-Defendant.

No. 98-09-02818
Slip. Op. No. 99-32

April 2, 1999

[48 F. Supp. 2d 1064]

Memorandum & Order

AQUILINO, Judge.

This case follows in the wake of legislation begun more than ten years ago in the Congress of the United States, followed by litigation in the U.S. District Court for the Northern District of California, continued in its Court of Appeals for the Ninth Circuit and then this Court of International Trade, followed by an appeal to the U.S. Court of Appeals for the Federal Circuit by the government and also by other nations' appeals to the World Trade Organization against the government. The complaint raises an issue first raised by the plaintiffs in case no. 94-06-00321 and resolved by this court *sub nom. Earth Island Institute v. Christopher*, 20 CIT 1221, 942 F.Supp. 597 (1996), which decision[2] was vacated by the Federal Circuit some *1066 two years later on procedural grounds *viz. Earth Island Institute v. Albright*[3].

I

The enactment of Congress which is at the core of this case and continuing controversy is found within the 1989 appropriations act for the Departments of Commerce and State, among others, Pub.L. No. 101-162, 103 Stat. 988, to wit:

> Sec. 609. (a) The Secretary of State, in consultation with the Secretary of Commerce, shall, with respect to those species of sea turtles the conservation of

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[2] That opinion and order will be referred to hereinafter as slip op. 96-165.

[3] 147 F.3d 1352 (Fed.Cir.1998). The court of appeals also remanded to this court the issue of whether an award of attorneys' fees and expenses to the plaintiffs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, would be appropriate. That issue has been resolved per *Earth Island Institute v. Albright*, 22 CIT ----, Slip Op. 98-151 (Nov. 4, 1998).

which is the subject of regulations promulgated by the Secretary of Commerce on June 29, 1987--

(1) initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations for the protection and conservation of such species of sea turtles;

(2) initiate negotiations as soon as possible with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which, as determined by the Secretary of Commerce, may affect adversely such species of sea turtles, for the purpose of entering into bilateral and multilateral treaties with such countries to protect such species of sea turtles;

(3) encourage such other agreements to promote the purposes of this section with other nations for the protection of specific ocean and land regions which are of special significance to the health and stability of such species of sea turtles;

(4) initiate the amendment of any existing international treaty for the protection and conservation of such species of sea turtles to which the United States is a party in order to make such treaty consistent with the purposes and policies of this section; and

(5) provide to the Congress by not later than one year after the date of enactment of this section--

(A) a list of each nation which conducts commercial shrimp fishing operations within the geographic range of distribution of such sea turtles;

(B) a list of each nation which conducts commercial shrimp fishing operations which may affect adversely such species of sea turtles; and

(C) a full report on--

(i) the results of his efforts under this section; and

(ii) the status of measures taken by each nation listed pursuant to paragraph (A) or (B) to protect and conserve such sea turtles.

(b)(1) IN GENERAL.--The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles shall be prohibited not later than May 1, 1991, except as provided in paragraph (2).

(2) CERTIFICATION PROCEDURE.--The ban on importation of shrimp or products from shrimp pursuant to paragraph (1) shall not apply if the President shall determine and certify to the Congress not later than May 1, 1991, and annually thereafter that--

(A) the government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and

(B) the average rate of that incidental taking by the vessels of the *1067 harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or

(C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.[4]

When the government decided to enforce this statute only within the "Wider Caribbean/Western Atlantic region", Earth Island Institute *et al.* brought their original action, complaining, among other things, that, on its face, the statute

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[4] 103 Stat. at 1037-38, 16 U.S.C. § 1537 note. This statute will be referred to hereinafter as section 609.

required worldwide application. This court ultimately concurred, *Earth Island Institute v. Christopher*, 19 CIT 1461, 913 F.Supp. 559 (1995). The government was afforded a period of five months to begin to prohibit

> the importation of shrimp or products of shrimp wherever harvested in the wild with commercial fishing technology which may affect adversely those species of sea turtles the conservation of which is the subject of regulations promulgated by the Secretary of Commerce on June 29, 1987, 52 Fed.Reg. 24,244, except as provided in Pub.L. No. 101-162 § 609(b)(2), 16 U.S.C. § 1537 note, and to report the results thereof to the court.

19 CIT at 1485-86, 913 F.Supp. at 580. The government responded with a motion for an additional one-year extension of time to comply. The motion was denied, and a final judgment to the foregoing effect was entered. *See Earth Island Institute v. Christopher*, 20 CIT 460, 922 F.Supp. 616, *appeals dismissed*, 86 F.3d 1178 (Fed.Cir.1996).

A

Soon thereafter, the State Department published Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations[5] and Bureau of Oceans and International Environmental and Scientific Affairs; Certifications Pursuant to Section 609 of Public Law 101-162, 61 Fed.Reg. 24,998 (May 17, 1996). The April 19 notice announced that the

> Department of State has determined that import prohibitions imposed pursuant to Section 609 do not apply to shrimp or products of shrimp harvested ... by commercial shrimp trawl vessels using TEDs

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[5] 61 Fed.Reg. 17,342 (April 19, 1996) [hereinafter referred to as "1996 Revised Guidelines"].

> comparable in effectiveness to those required in the United States.
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> * * * * * *
>
> *Shrimp Exporter's Declaration.* The Department of State has determined that, in order to achieve effective implementation of Section 609 on a world-wide basis, beginning May 1, 1996, all shipments of shrimp and products of shrimp into the United States must be accompanied by a declaration (DSP-121, revised) attesting that the shrimp accompanying the declaration was harvested either under conditions that do not adversely affect sea turtles ... or in waters subject to the jurisdiction of a nation currently certified pursuant to Section 609. All declaration[s] must be signed by the exporter of the shrimp. A government official of the harvesting nation must also sign those declarations asserting that the accompanying shrimp was harvested under conditions that do not adversely affect sea turtles. The declaration must accompany the shipment through all states of the export process, including in the course of any transshipments and of any transformation of the original product.[6]

*1068 Earth Island Institute *et al.* challenged this approach as "dangerous" and "disingenuous" because it

> eliminates any incentive for countries to put TEDs on more than a handful of nets. Countries can evade the Law's embargo by exporting to the United States those shrimp caught by a few designated vessels which are equipped with TEDs, while exporting elsewhere shrimp caught by those which

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[6] 61 Fed.Reg. at 17,343. The acronym "TEDs" refers to various turtle excluder devices. *See generally Earth Island Institute v. Christopher*, 19 CIT 1461, 1463 n. 1, 913 F.Supp. 559, 563 n. 1 (1995), and references cited therein.

> are not. This eviscerates *both* of Congress' purposes in enacting the Turtle Law. It fails to create the level playing field which Congress undeniably sought for the U.S. fleet, which is required to put TEDs on *each and every* vessel. It also guts the Law's objective of protecting these endangered species--for substantial portions of the shrimping fleets of exporting nations may now eschew TEDs with impunity.

20 CIT at ----, 942 F.Supp. at 600-01. In other words, the plaintiffs contended that the State Department's regulations were not in conformity with the court's judgment, whereupon they moved the court to compel the government to "embargo *all* wild-caught shrimp exports from countries which do not adopt a regulatory scheme requiring TEDs that is comparable to that of the United States." 20 CIT at ----, 942 F.Supp. at 601.

The court concurred--in slip op. 96-165, familiarity with which is presumed. Noting that the "constitutional, legislated will of Congress remains unambiguous upon reading and rereading its manifestation in section 609"[7], that the statute is "succinct and should be read in toto"[8], and that the domestic, U.S. comparator was an underpinning of the judgment which had not been modified by the government[9], the court reiterated that the record still supports a finding that the requirement of TEDs on all vessels of a harvesting nation at all times results in a satisfactory rate of incidental taking of endangered species of sea turtles. In the absence of intelligence to the contrary, it remains a fortiori that requiring anything less than is comparable to the U.S. program violates section 609 and the court's judgment.

20 CIT at ----, 942 F.Supp. at 605.

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[7] 20 CIT at ----, 942 F.Supp. at 603.

[8] *Id.*

[9] 20 CIT at ----, 942 F.Supp. at 605.

The government and the intervenor-defendant National Fisheries Institute, Inc. ("NFI") appealed the court's resultant order of enforcement to the Federal Circuit, which, as indicated above, ultimately vacated it on the ground that Earth Island Institute et al. withdrew beforehand the motion which had caused consideration of entry of such necessary, additional, equitable relief and thereby deprived this court of any jurisdiction.[10] *But see* 28 U.S.C. § 1585 ("The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States"); *United States v. Hanover Insurance Co.*, 82 F.3d 1052, 1054 (Fed.Cir.1996) ("the Court of International Trade has the inherent power to determine the effect of its judgments and issue injunctions to protect against attempts to attack or evade those judgments"). *See also* *1069*Bronson v. Shulten*, 104 U.S. (14 Otto) 410, 415, 26 L.Ed. 797 (1881) ("It is a general rule of the law, that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court"); *Wyler v. Union Pacific Ry. Co.*, 89 F. 41, 42 (C.C.W.D.Mo.1898) ("during the term all the proceedings are in the breast of the judge, and they may be altered or vacated as justice requires"); *Union Trust Co. v. Rockford, R.I. & St.L. R. Co.*, 24 F.Cas. 704, 705 (C.C.N.D.Ill.1874)(No. 14,401) ("the

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[10] *Earth Island Institute v. Albright*, 147 F.3d 1352, 1356 (Fed.Cir.1998). That court's vacatur for lack of jurisdiction also was held to apply to *Earth Island Institute v. Christopher*, 20 CIT 1389, 948 F.Supp. 1062 (1996), which decision had been engendered by the appellants' motions for stays of the order of enforcement, pending their appeals therefrom, and which had been granted in part by this court. *But see* CIT Rule and Federal Rule of Civil Procedure 62 (Stay of Proceedings to Enforce a Judgment) and Federal Circuit Rule of Practice and Federal Rule of Appellate Procedure 8 (Stay of Injunction Pending Appeal) and cases decided thereunder.

power of a court over its judgments, to set aside, modify or annul, is unlimited during the entire term at which such judgments are rendered"); *Sam v. State*, 33 Ariz. 421, 265 P. 622, 623 (1928); *Banegas v. Brackett*, 99 Cal. 623, 34 P. 344, 344-45 (1893); *Bradford v. People*, 22 Colo. 157, 43 P. 1013, 1015 (1896); *Whitaker v. Wright*, 100 Fla. 282, 129 So. 889, 891-92 (1930); *Tyler v. Eubanks*, 207 Ga. 46, 60 S.E.2d 130, 133 (1950); *Durre v. Brown*, 7 Ind.App. 127, 34 N.E. 577, 578 (1893); *Hallam v. Finch*, 197 Iowa 224, 195 N.W. 352, 353 (1923); *Sylvester v. Riebolt*, 100 Kan. 245, 164 P. 176, 177 (1917); *Fields v. Combs*, 230 Ky. 97, 18 S.W.2d 965, 966 (1929); *Barber v. Barber* 115 Me. 327, 98 A. 822, 823 (1916); *Harvey v. Slacum*, 181 Md. 206, 29 A.2d 276, 277 (1942); *Morse v. Morse*, 116 Mont. 504, 154 P.2d 982, 984 (1945); *Bradley v. Slater*, 55 Neb. 334, 75 N.W. 826, 826 (1898); *Henderson v. Dreyfus*, 26 N.M. 262, 191 P. 455, 457 (1920); *Cook v. Western Union Tel. Co.*, 150 N.C. 428, 64 S.E. 204, 205 (1909); *Maryland Cas. Co. v. John F. Rees Co.*, 40 N.E.2d 200, 202 (Ohio App.1941); *Tillman v. Tillman*, 199 Okla. 130, 184 P.2d 784, 785 (1947); *Bergman v. West*, 262 S.W.2d 435, 436 (Tex.Civ.App.1953).

B

Notwithstanding such well-established precedent, the government appellants argued to the Federal Circuit that this court "lacked any jurisdiction to rule"[11] and "exceeded any authority it might have had to enforce its own order". Brief for Madeleine K. Albright *et al.*, p. 20 (Fed.Cir. Nos. 97-1085,-1086 Feb. 11, 1997). At the same time as those appellants were also arguing in Washington that this court "erred in its interpretation of the scope of section 609"[12], the

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[11] Brief for Madeleine K. Albright *et al.*, p. 17 (Fed.Cir. Nos. 97-1085,-1086 Feb. 11, 1997). *See also* Corrected Reply Brief for Madeleine K. Albright et al., pp. 12-19 (Fed.Cir. Nos. 97-1085,-1086 June 1997).

[12] Brief for Madeleine K. Albright *et al.*, p. 25 *et seq.* (Fed.Cir. Nos. 97-1085,-1086 Feb. 11, 1997).

government was on another tack before the consolidated panel established in Geneva by the Dispute Resolution Body of the World Trade Organization ("WTO") at the instance of Malaysia and Thailand, and Pakistan, and finally India, *sub nom. United States--Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DSB/M/31 (12 May 1997). For example, the First Submission of The United States represented:

"A. Sea Turtles are a shared global resource

... 4. There has never been a clearer or more compelling case presented to the WTO for the conservation of an exhaustible natural resource or the protection of animal life or health than this dispute. For more than 20 years, there has been an international consensus ... that sea turtles are endangered. The international community ... has agreed that sea turtles need to be protected and conserved. Scientific research demonstrates that the accidental capture and drowning of sea turtles in shrimp trawl nets represents the single largest human-related cause of sea turtle deaths and has contributed greatly to the drastic demise of these species. Finally, the international community has recognized that the drowning of sea turtles *1070 in shrimp trawl nets can be virtually eliminated through the use of a simple, inexpensive device--the ... 'TED'. The required use of TEDs has become a multilateral environmental standard.

5. The United States requires its shrimp fishermen to harvest shrimp in a manner that is safe for sea turtles. In this case, the United States only asks that shrimp imported into the United States should be harvested in a comparable manner. In this way, the U.S. market will not cause a further depletion of endangered sea turtle species. In this way, the United States is not forced to be an unwilling partner in the extinction of sea turtles.

6. Moreover, the U.S. measures at issue in this case appear to be effective in protecting and conserving sea turtles while not disrupting trade. U.S. imports of shrimp have

remained steady, and suppliers have had little difficulty adjusting their practices so as to ensure that exports of shrimp to the United States have been harvested in a manner that does not harm sea turtles.

* * * * * *

B. Sea turtles are endangered

16. ... Today, all species of sea turtles face the danger of extinction, primarily because of human activities....

17. The international community has responded to the imperiled global status of sea turtles. Since 1975, all species of sea turtles have appeared on Appendix I to the Convention on International Trade in Endangered Species of Wild Flora and Fauna ("CITES"), which includes 'all species threatened with extinction which are or may be affected by trade.' Similarly, all species except the flatback are listed in Appendices I and II to the Convention on the Conservation of Migratory Species of Wild Animals and in Appendix II of the Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Carribean Region.

18. Since the 1970s, all species of sea turtles that occur in waters subject to U.S. jurisdiction have been listed as either endangered or threatened under the U.S. Endangered Species Act of 1973 ("ESA").

C. Shrimp trawl nets are the largest human-induced cause of sea turtle mortality

19. Sea turtles face a variety of threats in both the marine and nesting environments. However, the incidental capture and drowning of sea turtles in shrimp trawl nets has caused the greatest number of human-induced sea turtle deaths, accounting for more deaths than all other human activities combined. For this reason, the Marine Turtle Specialist Group of the IUCN (World Conservation Union) identified

reduction of sea turtle mortality in such trawling operations as a priority action item.

20. As early as 1982, it was recognized that 'shrimp trawlers are considered to capture and drown more sea turtles worldwide than any other form of incidental capture.' ...

* * * * * *

D. Turtle excluder devices (TEDs) effectively prevent the drowning of sea turtles in shrimp trawl nets

22. The turtle excluder device ... is a simple, cheap and highly effective solution to the problem of sea turtle mortality in shrimp trawl nets.... TEDs ... have been developed and manufactured on a commercial basis in a wide variety of nations.

23. The United States Government conducted a detailed, comprehensive study, involving thousands of hours spent by neutral observers aboard shrimp trawl vessels. Based on this study and its own exhaustive analysis, the U.S. National Academy of Sciences concluded in 1990 that properly installed TEDs--of the sort required for use in the United States for more than seven years--are a practical and cost-effective *1071 way to minimize the unintentional drowning of sea turtles in shrimp trawl nets. *Properly installed TEDs approach 97 percent efficiency in allowing sea turtles to escape from shrimp trawl nets, while limiting shrimp loss rates to 1-3 percent....*

24. TEDs are now widely used in shrimp trawl fisheries throughout the Western Hemisphere. More recently, African and Asian countries have begun requiring their use as well....

E. The use of TEDs has become a multilateral environmental standard

25. The use of TEDs has become a recognized multilateral environmental standard, fulfilling twin commitments on the part of the international community to conserve endangered species such as sea turtles and to minimize their unintentional mortality in fishing operations.

26. The international community has long recognized the need to protect endangered species such as sea turtles. There are now 134 nations that are parties to CITES....

27. The international community has also long been aware of the threat to sea turtles and to other living resources as a result of their incidental mortality in marine fishing operations. The 1982 United Nations Convention on the Law of the Sea ... generally requires States, both within areas under their national jurisdiction and on the high seas, to ensure through proper conservation and management measures that the maintenance of living resources is not endangered by over-exploitation....

* * * * * *

31. The countries in the Western Hemisphere understood that, because of the highly migratory nature of sea turtles, a treaty that afforded protection to sea turtles in only one region of the world would not succeed unless countries in other regions adopted comparable measures. For this reason, Article XX of the Inter-American Convention [for the Protection and Conservation of Sea Turtles[13]] encourages its parties to negotiate complementary protocols to that treaty with States in other regions in order to promote the protection and conservation of sea turtles outside the Western Hemisphere.

* * * * * *

33. ...[T]he required use of TEDs, both in Asia and throughout the Western Hemisphere, has become a multilateral environmental standard. Today, at least the following nations require TEDs on shrimp trawl vessels subject to their jurisdiction: Belize, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Indonesia, Mexico, Nicaragua, Nigeria, Panama, the People's Republic of China, Thailand, Trinidad and Tobago, the United States and Venezuela. Other nations in Asia and

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[13] 37 I.L.M. 1246.

Africa have informed the United States of their intention or desire to establish TEDs programs.

34. One reason why TEDs use has become so widespread is that the United States Government has undertaken extraordinary efforts to transfer TEDs technology to governments and industries in other countries, particularly in developing countries....

35. Through ... workshops and related efforts, the United States has transferred TEDs technology to at least the following countries: Australia, Belize, Brazil, Brunei, Colombia, Costa Rica, Ecuador, El Salvador, Eritrea, Guatemala, Guyana, Honduras, India, Indonesia, Japan, Kenya, Mexico, Madagascar, Malaysia, Mozambique, Nicaragua, Panama, the People's Republic of China, the Philippines, Singapore, Suriname, Tanzania, Thailand, Trinidad and Tobago, and Venezuela....

36. Recently, the United States intensified its TEDs technology transfer efforts. In 1996 alone, the United States conducted TEDs training workshops in Mombasa, Kenya; in Songkla, Thailand; in Tegal, *1072 Indonesia; in Guayaquil, Ecuador; and in Orissa, India. The workshop in Thailand ... includ [ed] ... fisheries managers and shrimp fishermen from Australia, Brunei, Japan, Malaysia, the Philippines, Singapore and Thailand. In 1997, ... the United States ... held TEDs workshops in Mombasa, Kenya ...; in several locations in Australia; in Cochin, India; and in Chittagong, Bangladesh.

37. ... TEDs have become a true environmental success story.... Their use is now a multilateral environmental standard.

F. TEDs are required in the United States to minimize sea turtle mortalities caused by shrimp trawling

38. The United States Government requires shrimp trawl vessels that operate in waters subject to U.S. jurisdiction in which there is a likelihood of intercepting sea turtles to use TEDs at all times.

39. ... [A]ll species of sea turtles occurring in waters subject to U.S. jurisdiction are listed as endangered or threatened under the ESA. Under the authority of the ESA, NMFS[14] first required the use of TEDs by shrimp trawl vessels operating in U.S. waters on the basis of regulations promulgated in 1987, which went into full effect in 1990. The 1987 regulations required that all vessels 25 feet or longer must use TEDs when trawling for shrimp in offshore waters where there is a likelihood of intercepting sea turtles and that shrimp vessels less than 25 feet trawling in such offshore waters must use TEDs or restrict their tow time to 90 minutes or less. Tow times that short in duration are not likely to result in the drowning of captured sea turtles. Similarly, all vessels trawling for shrimp in such inshore waters were required to use TEDs or to limit tow times to 90 minutes or less. The regulations also set forth required specifications for TEDs, a primary requirement being a 97 percent exclusion rate of captured sea turtles.

40. A 1990 U.S. National Academy of Sciences report on sea turtles ... recommended tightening and extending the requirements for TEDs. NMFS accordingly promulgated even stricter TEDs requirements in 1992, which were implemented in three phases (late 1992, January 1993 and December 1994). Since December 1, 1994, these regulations have required the use of TEDs in all shrimp trawl nets, with very limited exceptions, and have eliminated the option for some small shrimp trawl vessels to restrict tow times in lieu of using TEDs....

G. Without the use of TEDs, other measures to protect sea turtles are insufficient

41. ... Any effective program to allow the recovery of these endangered species must include the required use of

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[14] National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

TEDs by shrimp trawl vessels that operate in areas and at times where there is a likelihood of intercepting sea turtles.

* * * * * *

47. ... [E]ven if ... other measures taken ... to protect sea turtles were effectively enforced, without the required use of TEDs, they would be insufficient to allow sea turtle populations in that region of the world to recover. These other conservation measures have not been shown to have any significant effect on the number of sea turtles that survive to adulthood and reproduce.

H. Section 609 promotes the protection and conservation of sea turtles

48. Because sea turtles migrate widely and are a shared global resource, U.S. domestic measures to protect sea turtles would not be effective unless shrimp exported to the United States by other nations *1073 is harvested in a manner that does not harm sea turtles.

* * * * * *

50. Section 609 ... ensures shrimp exported to the U.S. market is harvested in a manner that does not harm sea turtles. Section 609(b) prohibits the importation of shrimp or products from shrimp harvested with commercial fishing technology that may adversely affect species of sea turtles protected under U.S. laws and regulations ....

51. Following the enactment of Section 609 in 1989, the U.S. Government stepped up its campaign ... to transfer TEDs technology to other countries. In addition, the U.S. Department of State developed a set of guidelines for determining the comparability of foreign programs for the protection of sea turtles in shrimp trawl fishing operations. The Department ... provided copies of them to all affected governments....

52. Until recently, the U.S. Administration implemented Section 609 based on the interpretation that it applied only to nations in the Wider Caribbean/Western Atlantic region....

The initial Department of State Guidelines, published in 1991 and revised in 1993, set forth the criteria for certification of these countries. The Department ... established interim requirements for certification in the first years, designed to encourage the development of comprehensive TEDs programs in these countries. As of May 1, 1994, certification depended on the implementation of such a comprehensive TEDs program.

53. On December 29, 1995, the U.S. Court of International Trade issued an order ... requiring that Section 609 be applied on a global basis as of May 1, 1996....

54. Following the ... order ..., the Department of State issued the current Guidelines to reflect the requirement to apply Section 609 on a global basis.... They make clear that the United States Government requires commercial shrimp trawl vessels in the United States to use TEDs in areas and at times when there is a likelihood of intercepting sea turtles.

* * * * * *

61. For those shrimp harvesting nations ... whose shrimp fishing environments *do* pose a threat to sea turtles, the Guidelines ... set forth criteria upon which the Department of State bases its determinations for certification under Section 609. The Department ... certifies any such nation as having a program to protect sea turtles in the course of shrimp trawl fishing comparable to the U.S. program if the nation requires the use of TEDs in a manner comparable to the TEDs requirements in effect in the United States and if the nation has a credible enforcement effort that includes monitoring for compliance and appropriate sanctions. Because TEDs, if used properly, allow at least 97 percent of captured sea turtles to escape from shrimp trawlnets, the Guidelines provide that any nation which adopts and enforces TEDs requirements comparable to those of the United States will also be deemed to have achieved a comparable 'incidental take rate' of sea turtles in its commercial shrimp trawl fisheries.

* * * * * *

63. In 1997, the Department of State ... certified forty-two shrimp harvesting nations pursuant to Section 609.

64. The Department of State has certified 24 nations as having shrimp fishing environments that do not pose a threat of incidental taking of sea turtles in the course of commercial shrimp trawl fishing. Of those 24 nations, the Department determined that the following 16 nations have shrimp fisheries in only cold waters where there is essentially no risk of taking sea turtles: Argentina, Belgium, Canada, Chile, Denmark, Finland, Germany, Iceland, Ireland, the Netherlands, New Zealand, Norway, Russia, Sweden, the United Kingdom and Uruguay. The Department certified the following eight nations on grounds that their fishermen only harvest shrimp *1074 using manual rather than mechanical means to retrieve nets: the Bahamas, Brunei, the Dominican Republic, Haiti, Jamaica, Oman, Peru and Sri Lanka.

65. The Department of State has also certified the following nations ... as having adopted programs to reduce the incidental capture of sea turtles in shrimp fisheries comparable to the U.S. program: Belize, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Indonesia, Mexico, Nicaragua, Nigeria, Panama, the People's Republic of China, Thailand, Trinidad and Tobago, and Venezuela.

I. The U.S. measures have not disrupted trade

66. The U.S. measures at issue in this dispute have not disrupted the importation of shrimp into the United States. Those measures went into effect with respect to the Complainants and other shrimp harvesting nations outside the Wider Caribbean/Western Atlantic region on May 1, 1996. Even though the measures were in effect throughout the last two thirds of 1996, ... U.S. shrimp imports in 1996 were within 1 percent of the average annual level from 1993-1995.

67. Furthermore, were the U.S. measures at issue in this dispute truly disruptive of trade, one would expect that a restriction in supply would result in a corresponding increase in the price of shrimp imports into the United States. The opposite has occurred. The average unit value of U.S. shrimp imports *declined* between 1995 and 1996, falling from $9.52 (U.S.) per kilogram to $9.30 (U.S.) per kilogram."[15]

This well-documented presentation was supplemented by the government, in part, as follows:

> ... Section 609 is "made effective in conjunction with restrictions on domestic production or consumption." The Appellate Body interprets this criterion to mean that the measures concerned impose restrictions not just on the imported product but also with respect to the comparable domestic product. The Appellate Body has also stated that this requirement is one of "even- handedness," and that there is no textual basis for *identical* treatment of domestic and imported products.
>
> 61. These tests are met here. The United States requires its shrimp trawl vessels that operate where there is a likelihood of intercepting sea turtles to use TEDs at all times. Section 609 applies comparable standards to imported shrimp. The statute allows any nation to be certified--and thus to avoid any restriction on shrimp exports to the United States--if it meets criteria for sea turtle safety in the course of shrimp harvesting that are comparable to criteria applicable in the United States. In particular, for those nations whose shrimp trawl vessels operate in areas where there is a likelihood of intercepting sea turtles, Section 609 allows for certification if such

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[15] *United States--Import Prohibition on Certain Shrimp and Shrimp Products* First Submission of The United States, WT/DSB/M/31, § III (June 9, 1997) (all emphasis in original; supporting citations omitted).

nations adopt TEDs requirements comparable to those in effect in the United States.[16]

Notwithstanding these unrefuted, and largely irrefutable, averments[17], the dispute-*1075 resolution panelists from Brazil, Germany and Hong Kong did not accept the U.S. approach as completely consistent with the 1994 General Agreement on Tariffs and Trade, concluding that it constituted clearly a threat to the multinational trading system ... applied without any serious attempt to reach, beforehand, a negotiated solution.

7.502 We therefore find that the U.S. measure at issue is not within the scope of measures permitted under the chapeau of Article XX.[18]

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[16] *United States--Import Prohibition of Certain Shrimp and Shrimp Products* Second Submission of The United States of America, WT/DSB/M/31, paras. 60, 61 (July 28, 1997)(emphasis in original; citing *United States-- Standards for Reformulated and Conventional Gasoline* Report of the Appellate Body, WT/DS2/AB/R (Jan. 29, 1996), and First Submission of The United States, paras. 50-62).

[17] *See United States--Import Prohibition of Certain Shrimp and Shrimp Products* Report of the Panel, WT/DS58/R (15 May 1998) passim; Submission of The United States (Appellant) Before The World Trade Organization Appellate Body, AB-1998-4, para. 5, p. 2 (23 July 1998) ("The Panel in its findings does not take issue with the factual assertions of the United States").

[18] *United States--Import Prohibition of Certain Shrimp and Shrimp Products* Report of the Panel, WT/DS58/R, paras. 7.501, 7.502 (15 May 1998). Article XX provides, in pertinent part:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

* * * * * * *

(b) necessary to protect human, animal or plant life or health;

* * * * * * *

Whereupon the United States formally appealed to the WTO's Appellate Body on the ground that,

> [u]nder this improper reasoning, any measure falling under any one of the Article XX exceptions would nonetheless be outside the scope of Article XX if a Panel, in its own subjective view, believed that the measure hypothetically could cause harm to some undefined, idealized "trading system."
>
> 7. Not only is the Panel's adoption of this "threat to the multilateral trading system" test inconsistent with the text of the GATT 1994, ... it also reflects a fundamental misinterpretation of the object and purpose of the World Trade Organization Agreement. The WTO Agreement, which was the first multilateral trade agreement concluded after the United Nations (UN) Conference on Environment and Development, provides that the rules of trade must not only promote expansion of trade and production, but do so in a manner that respects the principle of sustainable development and protects and preserves the environment. The Panel's "threat to the multilateral trading system" test would make trade concerns paramount to all other concerns, and

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(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; ....

According to the Report of the Appellate Body in *United States--Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, p. 22, the proper application of this article involves a two-tiered analysis: First, the regulation at issue must be "provisionally justified" by one of the enumerated exceptions--paragraphs (a) to (j). Second, the measure must satisfy the requirements of the introductory clauses, the article's chapeau. In other words, the measure, as applied, must not be either "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", or "a disguised restriction on international trade".

> is thus inconsistent with the object and purpose of the WTO Agreement.

Submission of The United States (Appellant) Before The World Trade Organization Appellate Body, AB-1998-4, paras. 6, 7 (23 July 1998) (footnote omitted). In doing so, it emphasized some of the facts quoted above at length and originally presented to the consolidated panel, including:

> The United States Government requires shrimp trawl vessels that operate in waters subject to U.S. jurisdiction in which there is a likelihood of intercepting sea turtles to use TEDs at all times. Because sea turtles migrate widely, U.S. domestic measures to protect sea turtles would not be effective unless other nations also act to protect them. Accordingly, U.S. law (*1076Section 609 of Public Law 101-162) calls for bilateral and multilateral efforts to protect sea turtles.

Id., para. 16 (footnotes omitted).[19]

II

Prior to issuance of the WTO Appellate Body Report, but after the mandate of the Federal Circuit had come down,

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[19] While the Appellate Body did conclude that the consolidated panel had erred in finding that the U.S. approach is not within the scope of measures permitted under the *chapeau* of Article XX of the GATT 1994, and also in finding that accepting non-requested information from non- governmental sources is incompatible under the WTO dispute-resolution process, it also concluded, for reasons referred to hereinafter, that the

> United States measure, while qualifying for provisional justification under Article XX(g), fails to meet the requirements of the chapeau of Article XX, and, therefore, is not justified under Article XX of the GATT 1994.

United States--Import Prohibition of Certain Shrimp and Shrimp Products Report of the Appellate Body, WT/DS58/AB/R, para. 187 (12 Oct. 1998) (referred to and cited hereinafter as "WTO Appellate Body Report").

the State Department determined to publish *Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*[20], perhaps in the hope of influencing the deliberations of that body before rendering its decision.[21] The notice advises of the Department's decision to "reaffirm", subject to "certain modifications"[22], its 1996 Revised Guidelines, the enforcement of which had been enjoined, in part, per this court's slip op. 96-165:

> The Department of State reinstates its determination that the harvesting of shrimp with TEDs does not adversely affect sea turtle species and that TED-caught shrimp is therefore not subject to the import prohibition created by Section 609(b)(1).... [H]owever, the Department ... has decided to establish several conditions and incentives relating to the importation of such shrimp that are intended to address concerns that have been raised about the effect of this determination on the conservation of sea turtle species.

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[20] 63 Fed.Reg. 46,094 (Aug. 28, 1998) [referred to hereinafter as "1998 Revised Guidelines"].

[21] *Compare, e.g.*, transcripts of telephone conference with counsel in this case on September 18, 1998, pp. 27-28 and of oral argument on December 14, 1998, pp. 59, 84, 101 *and* WTO Appellate Body Report, para. 5, p. 4 and n. 23 thereto, *with* AR Tab 6, first two pages (decision "done solely for domestic reasons"). Defendants' counsel have seen fit to repeat these words, first scribbled by defendant Eizenstat at the top of the State Department's "Action Memorandum", in their memorandum of law, pp. 7-8, 38 and at oral argument, Tr. p. 100, but without any hint as to what those reasons might have been. *See also* Dep't of State, *Notice of Proposed Revisions to Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*, 64 Fed.Reg. 14,481, 14,482 (March 25, 1999) [hereinafter referred to as "March 1999 Notice of Revisions"]("For reasons unrelated to the WTO case, the Department ... modified its implementing Guidelines on August 28, 1998").

[22] 63 Fed.Reg. at 46,095.

63 Fed.Reg. at 46,095. Those concerns are stated to be that foreign harvesters will fraudulently claim that shrimp have been harvested with TEDs, that foreign nations which have established regulatory programs comparable to the U.S. program will abandon or limit them so that only trawlers harvesting shrimp for export to the U.S. market will actually employ TEDs, and that other nations which may be considering the adoption of such a program may opt instead for equipping only those vessels trawling for shrimp for the American market. *See id.* Of course, as the Department indicates, only time might prove which of these materialize antithetically to the concerns of Congress in enacting section 609. For the moment, the world is apprised of the U.S. government's resurrected "decision to permit the importation of TED-caught shrimp from uncertified nations". *Id. See* March 1999 Notice of Revisions, 64 Fed.Reg. at 14,482.

***1077 A**

This decision has brought forth the above-named plaintiffs, commencing this case via simultaneous filing of a summons and complaint and application for temporary restraining order and preliminary injunction. Among other relief[23], they request that the court declare that the resultant 1998 Revised Guidelines are in violation of the Administrative Procedure Act and section 609; enjoin the defendants from allowing the importation of shrimp and shrimp products from any nation with commercial fishing operations which may adversely impact sea turtles unless and until the Secretary of State determines and certifies ... that the foreign nation has a current and enforceable sea turtle protection program (including the requirement that TEDs are used on all shrimp trawling vessels), and an incidental taking rate fully comparable to that of the United States at the

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[23] *See generally* Plaintiffs' Complaint for Declaratory Judgment, Review of AgencyAction, Mandamus and Injunctive Relief, § IX.

present time[24];] and order the Secretary of State to make publicly available all evidence supportive of a determination that a particular nation has a comparable regulatory program and rate of incidental taking of sea turtles.

The court afforded all parties an opportunity to be heard on plaintiffs' application for immediate injunctive relief. A temporary restraining order was denied, whereupon the plaintiffs have interposed a motion for judgment upon the record filed herein by the defendants.

The court's jurisdiction over this kind of case has been established to be pursuant to 28 U.S.C. § 1581(i). *See Earth Island Institute v. Christopher*, 6 F.3d 648 (9th Cir.1993), and *Earth Island Institute v. Christopher*, 19 CIT 812, 890 F.Supp. 1085 (1995). And it "shall review the matter as provided in section 706 of title 5"[25], U.S.C., which part of the Administrative Procedure Act authorizes the court, among other things, to set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

(1)

As submitted, the record is represented to include all documents pertaining to the decision of Stuart E. Eizenstat, Under Secretary of State for Economic, Business and Agricultural Affairs, to revise the implementation of certain aspects of section 609, as reflected in the notice published by the Department[26], *supra*. It reveals that the decision was based upon the "Action Memorandum"[27] in the name of the Acting Assistant Secretary of State for Oceans and

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[24] *Id.*, p. 11, para. 5 (emphasis in original).

[25] 28 U.S.C. § 2640(e).

[26] Declaration of David A. Balton, Director of the Office of Marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State, para. 2.

[27] *See* AR Tab 6.

International Environmental and Scientific Affairs, defendant Kimble herein. In a subsequent letter to NFI, she explains the crux of the decision to be:

> ... We remain of the view, as we argued before th[e] Court [of Appeals for the Federal Circuit], that shrimp caught in trawl nets equipped with ... TEDs [ ] are not "harvested with commercial fishing technology that may adversely affect" species of sea turtles. Such shrimp is thus not subject to the import prohibition that Congress established in Section 609.

AR Tab 11, p. 3. *See also* AR Tab 6, p. 3. According to the record, it was arrived at over the stated concerns and objections of a number of organizations committed to, if not expert in, the protection and preservation of endangered species[28], including the *1078 government's own NMFS, which is the organization within the Department of Commerce most directly involved in compliance with the mandate of Congress in section 609. The objections of the Assistant Administrator for Fisheries, defendant Schmitten herein, were articulated, in part, as follows:

> ... NMFS does not believe that DOS should return to permitting the import of shipments of turtle excluder device (TED) caught shrimp from uncertified countries. We foresee several difficulties with this approach.
>
> We believe that this approach will significantly diminish the conservation benefit of P.L. 101-162,

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[28] For example, the letter at AR Tab 1 to Secretary of State Albright and U.S. Trade Representative Barshefsky was signed by the heads of the Center for International Environmental Law, Center for Marine Conservation, Community Nutrition Institute, Defenders of Wildlife, Earth Island Institute, Earthjustice Legal Defense Fund, Environmental Defense Fund, Friends of the Earth, Greenpeace, Humane Society of the United States, National Wildlife Federation, Natural Resources Defense Council, and the Sierra Club.

> Section 609. By requiring that TEDs be used only on those vessels that harvest shrimp for export to the U.S. market, sea turtles will be put at greater risk of incidental capture aboard non-TED equipped boats in a nation's fleet.
>
> This approach will also reduce the incentive for nations to adopt comprehensive national programs to reduce the incidental take of sea turtles. The "shipment-by-shipment" authorization may also result in some certified nations abandoning the comprehensive programs they now have in place or curtailing enforcement of such programs.
>
> A "shipment-by-shipment" approach will also create enforcement problems. It will be extremely difficult to verify that shrimp being imported as TED-caught from uncertified nations were actually harvested by a trawler using a TED.
>
> AR Tab 4, first page.

(2)

Whatever the underlying differences of opinion, defendants' stated position herein is that their 1998 Revised Guidelines are in accordance with section 609(b)(1), *supra*. In summary, they argue that the guidelines conform to the plain meaning of the statute, that its legislative history supports their interpretation, and that any ambiguity should be resolved in a manner deferential to their administrative prerogatives and/or that affects the fewest nations and shipments possible, consistent with the doctrine articulated in *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804).

No doubt, this position, and that of the intervenor-defendant, derive from their presentations on the merits to the Court of Appeals for the Federal Circuit[29], which did vacate

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[29] *See, e.g., supra* n. 12.

this court's slip op. 96-165 on the issue raised again herein, albeit on procedural grounds "deemed to be without prejudice"[30] to renewal. There also can be no doubt, and none of the parties argue otherwise, that

> [i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *Earth Island Institute v. Christopher*, 19 CIT at 1479, 913 F.Supp. at 575.

The primary focus of the initial litigation over section 609 was whether it was intended to be enforced worldwide, that is, "within the geographic range of distribution of [endangered] sea turtles"[31], or just within the wider Caribbean/western Atlantic, which was the government's challenged *1079 initial preference and practice. The court held the statute's scope to be

> clear and unambiguous.... Its language includes "*all* foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which ... may affect adversely [endangered or threatened] species of sea turtles" and "protection of specific ocean and land *regions* which are of special significance to the health and stability of such species of sea turtles" and "amendment of *any* existing international treaty for the protection and conservation of such species of sea turtles to which the United States is a party" and "*each* nation" which conducts commercial shrimp fishing operations within the geographic range of distribution of such sea turtles and which may affect

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[30] 147 F.3d at 1356.

[31] Section 609(a)(5)(A), 103 Stat. at 1037, 16 U.S.C. § 1537 note.

> them adversely. No language of section 609 restricts its geographical purview, nor can the court accept the premise that the statute is simply silent on the matter.

19 CIT at 1479, 913 F.Supp. at 575 (emphasis in original; footnotes omitted). Apparently, the defendants now adhere to this decision. *See, e.g.*, 1996 Revised Guidelines; 1998 Revised Guidelines; Part I B, *supra*; March 1999 Notice of Revisions.

That opinion of the court did uphold that part of the State Department's *Revised Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations*, 58 Fed.Reg. 9,015, 9,017 (Feb. 18, 1993), which notified "affected nations" that, to receive certification pursuant to section 609(b)(2)(A) and (B), *supra*, in 1994 and in subsequent years, they had "to require the use of TEDs on all of their shrimp trawl vessels" and that the take rates of sea turtles would be "deemed comparable if the[y] require that all shrimp trawl vessels use TEDs at all times". *See* 19 CIT at 1483-84, 913 F.Supp. at 578. That standard of comparison was based upon the requirement for U.S. trawlers[32] and is continued in the 1998 Revised Guidelines as a basis for certification of foreign harvesting nations. See 63 Fed.Reg. at 46,096. Indeed, the history of section 609's enforcement to date does not reveal presidential certification of such nations, including those of the wider Caribbean/western Atlantic region, to Congress under subsections (b)(2)(A) and (B) other than on that ground. Hence, Brazil, for example, has not been certifiedeach year, even though individual trawlers flying its flag are and have been rigged with TEDs.[33]

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[32] *See generally* Dep't of Commerce, Nat'l Oceanic and Atmospheric Admin., *Sea Turtle Conservation; Shrimp Trawling Requirements*, 52 Fed.Reg. 24,244 (June 29, 1987).

[33] *Compare, e.g.*, Dep't of State, Bureau of Oceans and Int'l Environmental and Scientific Affairs, *Certifications Pursuant to Section*

It is the shrimp netted by such vessels around the world that is now granted entry to the expansive U.S. market by the 1998 Revised Guidelines on the ground quoted above, namely, the harvesting of shrimp with TEDs does not adversely affect sea turtle species. And the intervenor-defendant, if not all of the defendants, is of the view that this approach will encourage more vessels from uncertified *1080 countries to equip their nets with TEDs, thereby rescuing ever more endangered by-catch and also increasing the likelihood of presidential certification of additional home-port nations.

Whatever the appeal of this perception, the court cannot and therefore does not conclude that it comports with the expressed approach of Congress in section 609, which is notable for its clarity of purpose and cohesiveness of content. Certainly, Congress did not intend to, or in fact, leave room for the kind of reversal of course the defendants attempt to renew herein.[34] Indeed, prior to this court's judgment in

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609 of Public Law 101-162, 59 Fed.Reg. 25,697 (May 17, 1994) (Brazil certified because it "has established and is implementing the legal requirement to use TEDs"), *and* Dep't of State, Bureau of Oceans and Int'l Environmental and Scientific Affairs, *Certifications Pursuant to Section 609 of Public Law 101-162*, 62 Fed.Reg. 19,157 (April 18, 1997) (Brazil recertified because of regulation adopted "prohibiting shrimp trawling conducted in ways harmful to sea turtles"), *with Bureau of Oceans and International Environmental and Scientific Affairs; Certifications Pursuant to Section 609 of Public Law 101-162*, 61 Fed.Reg. 24,998 (May 17, 1996) (Brazil deleted from list of certified nations), *and Bureau of Oceans and International Environmental and Scientific Affairs; Certifications Pursuant to Section 609 of Pub.L. 101-162*, 63 Fed.Reg. 30,550 (June 4, 1998) (Brazil did not retain certification because it "failed to demonstrate ... regulations requiring the use of ... TEDs [ ] were being adequately enforced").

[34] Defendants' record contains a letter from a member of Congress who had voted for section 609 in 1989 and who, now as Ranking Democratic Member of the Committee on Resources, U.S. House of Representatives, corresponded with President Clinton on June 23, 1998, in part, as follows:

Earth Island Institute v. Christopher that the government was in violation of the intent of Congress that section 609 apply to shrimp shipments from everywhere in the world[35], not just

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... I have grave concerns about the Administration implementing a shipment-by-shipment approach. Such an approach is not only unenforceable, it is inconsistent with the clear congressional intent of P.L. 101-162, which requires certification that harvesting nations have adopted a regulatory program governing the incidental taking of such sea turtles that is "comparable" to that of the United States. As a result of hard work by Congress, the environmental community, and the National Marine Fisheries Service, the U.S. has implemented a comprehensive regulatory program to ensure that turtle excluder devices (TEDs) are used throughout the U.S. shrimp fishery. Thus, for purposes of certifying harvesting nations under P.L. 101-162, the Administration cannot merely attempt to satisfy itself that individual shipments have been harvested using TEDs; it must ensure that those nations have adopted comprehensive TEDs protections.

AR Tab 2, first page.

To the extent others in Congress may have a different opinion, none has been presented herein by the defendants. Be that as it may, the court has already found that section 609's legislative history, such as it is, does not sway interpretation of the adopted language. *See Earth Island Institute v. Christopher*, 19 CIT at 1481, 913 F.Supp. at 576.

[35] In fact, the government's disregard of this fundamental dictate of section 609, as reflected in subsection (a) thereof, *supra*, until ordered to cease and desist by the court in 1996, proved to be a predicate of the decision of the WTO Appellate Body, to wit:

... The record does not ... show that serious efforts were made by the United States to negotiate similar agreements [to the Inter-American Convention] with any other country or group of countries before (and, as far as the record shows, after) Section 609 was enforced on a world-wide basis on 1 May 1996. Finally, the record also does not show that the appellant, the United States, attempted to have recourse to such international mechanisms as exist to achieve cooperative efforts to protect and conserve sea turtles before imposing the import ban.

172. Clearly, the United States negotiated seriously with some, but not with other Members (including the appellees), that export shrimp to the United States. The effect is plainly discriminatory and, in our view, unjustifiable. The unjustifiable nature of this discrimination emerges clearly when we consider the cumulative effects of the failure of the United States to pursue negotiations for establishing consensual means of

the wider Carribean, the act was administered*1081 exclusively on an international basis, as recently explained at length to the WTO. Consistent with the mandate of section 609, paragraphs 61 and 64 quoted above show the United States has taken into account the "shrimp fishing environments" of harvesting nations that do and do not pose a threat to sea turtles, not their individual citizens or companies at work in those waters. Hence, Brazil, for example, with trawlers outfittedwith TEDs, still has been found to be a harvesting nation with commercial fishing technology which "may" affect adversely the endangered species of sea turtles and thus within such expansive, "general" ambit of the section 609(b)(1) prohibition, *supra*, "except as provided in paragraph (2)." Given that clause in that context and the fact that general provisions rarely can be read to be dispositive of specific standards of a carefully-constructed statutory scheme, the court is constrained to conclude yet again that paragraph (1) of section 609(b) is specifically contingent upon the certification procedure established by section 609(b)(2), which offers the only congressionally-approved breaches of the embargo, either via

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protection and conservation of the living marine resources here involved, notwithstanding the explicit statutory direction in Section 609 itself to initiate negotiations as soon as possible for the development of bilateral and multilateral agreements. The principal consequence of this failure may be seen in the resulting unilateralism evident in the application of Section 609. As we have emphasized earlier, the policies relating to the necessity for use of particular kinds of TEDs in various maritime areas, and the operating details of these policies, are all shaped by the Department of State, without the participation of the exporting Members. The system and processes of certification are established and administered by the United States agencies alone. The decision-making involved in the grant, denial or withdrawal of certification to the exporting Members, is, accordingly, also unilateral. The unilateral character of the application of Section 609 heightens the disruptive and discriminatory influence of the import prohibition and underscores its un justifiability.

WTO Appellate Body Report, paras. 171, 172 (citations omitted).

subparagraphs (A) and (B) or through (C). Paragraphs (b)(1) and (b)(2) are *pari materia*; they cannot be read independently, or out of the context adopted by Congress, including section 609(a), to slow or stanch the extinction of species of sea turtles. And so long as the 1998 Revised Guidelines report that the "foundation of the U.S. program" continues, with "limited exceptions", to be that "all other commercial shrimp trawl vessels operating in waters subject to U.S. jurisdiction in which there is a likelihood of intercepting sea turtles must use TEDs at all times"[36], the catch of vessels equipped with TEDs from nations without such comparable foundation continues subject to embargo.

III

In the light of the foregoing, the court concludes that that part of the 1998 Revised Guidelines which constitutes the decision to permit the importation of TED-caught shrimp from uncertified nations, on its face, is not in accordance with section 609, *supra*. Before any entry of judgment on plaintiffs' motion herein, however, the court will await defendants' annual report to Congress pursuant to section 609(b)(2), their report to the court on any responses to their March 1999 Notice of Revisions, and the presentment of evidence on or before July 2, 1999 regarding the actual enforcement of the 1998 Revised Guidelines to date, as well as of the 1996 Revised Guidelines between April and November of 1996.

So ordered.

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[36] 63 Fed.Reg. at 46,095. *See generally* Part I B, *supra*.

APPENDIX D

UNITED STATES COURT OF APPEALS,
FEDERAL CIRCUIT

TURTLE ISLAND RESTORATION NETWORK, TODD STEINER, THE AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, THE HUMANE SOCIETY OF THE UNITED STATES, AND THE SIERRA CLUB,

Plaintiffs-Appellants,

v.

DONALD L. EVANS, SECRETARY OF COMMERCE, COLIN L. POWELL, SECRETARY OF STATE, PAUL H. O'NEILL, SECRETARY OF THE TREASURY, DAVID B. SANDLAW, ASSISTANT SECRETARY OF STATE FOR THE BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, PENELOPE D. DALTON, ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL MARINE FISHERIES SERVICE, AND ALAN P. LARSON, UNDER SECRETARY OF STATE FOR ECONOMIC BUSINESS AND AGRICULTURAL AFFAIRS,

Defendants-Cross Appellants,

and

NATIONAL FISHERIES INSTITUTE, INC.,

Defendant-Cross Appellant.

Nos. 00-1369, 00-1581, 00-1582

DECIDED Aug. 8, 2002

[299 F.3d 1373]

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

ORDER

A combined petition for panel rehearing and rehearing *en banc* was filed by the plaintiffs-appellants, and responses thereto were invited by the court and filed by the defendants-cross appellants.[1] Amicus Curiae briefs were filed by the Georgia Shrimp Association and Boone Seafood, and Dr. Frank V. Paladino, et al. This matter was referred first to the merits panel that heard this appeal.

Thereafter, the petition for rehearing *en banc* was referred to the circuit judges who are in regular service and authorized to request a poll. A poll was requested, taken, and failed.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The petition for rehearing is denied.

(2) The petition for rehearing *en banc* is denied.

GAJARSA, Circuit Judge, with whom NEWMAN, Circuit Judge, joins, dissents from the denial of the petition for rehearing en banc.

GAJARSA, Circuit Judge, with whom NEWMAN, Circuit Judge, joins, dissenting from the denial of the petition for rehearing en banc.

For the reasons stated herein, we respectfully dissent from the court's denial of the petition to rehear this case en banc. In *Turtle Island Restoration Network v. Evans*, 284 F.3d 1282 (Fed.Cir.2002) ("*Turtle Island*"), a divided panel of this court held that The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. 101- 162, Title VI, § 609, 103 Stat. 1037 (1989) (codified at 16 U.S.C. § 1537 note (2000)) ("section 609"), permits the importation of shipments of shrimp that the statute plainly prohibits. The panel majority reached this conclusion by adopting an

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[1] The governmental parties, and the National Fisheries Institute, Inc. each filed responses.

unreasonable statutory interpretation. This unreasonable interpretation was first reflected in State Department Guidelines interpreting section 609 in 1996. *Turtle Island*, 284 F.3d at 1302 (Newman, J., dissenting). In the preceding six years, however, the State Department had a conflicting interpretation of the statute. In *Turtle Island*, the panel majority adopted the State Department's most recent, unreasonable interpretation of the scope of the embargo codified in section 609. In so doing, the decision also contravened clear and well-established Supreme Court precedent directing that the judiciary "must reject administrative constructions which are contrary to clear congressional*1375 intent," *I.N.S. v. Cardoza Fonseca*, 480 U.S. 421, 447-48, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987) (quoting *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843, n. 9, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)), and that "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view," *id.* at 446 n. 30, 107 S.Ct. 1207 (quoting *Watt v. Alaska*, 451 U.S. 259, 273, 101 S.Ct. 1673, 68 L.Ed.2d 80 (1981)). Accordingly, this court should have granted the petition for rehearing en banc.

Sea turtles, several species of which are endangered, frequently inhabit the same waters as shrimp. *Turtle Island*, 284 F.3d at 1286. When mechanized shrimping vessels trawl for shrimp, their nets also catch sea turtles. *Id.* at 1284. Sea turtles must breathe air after 90 minutes of submersion, and trawl nets are typically deployed for longer than 90 minutes. *Id.* Thus, shrimping with mechanized commercial trawlers drowns sea turtles. *Id.* Since 1987 the United States has required shrimp trawlers operating in U.S. waters where sea turtles are found to install turtle excluder devices ("TEDs"). *Id.*

Section 609 applies to countries that seek to import shrimp to the United States. Section 609 bans the importation of certain shrimp unless the harvesting nation

obtains certification either by: 1) adopting regulatory measures comparable to those applicable in the United States and obtaining a comparable average rate of incidental taking of sea turtles; or 2) harvesting in a fishing environment that poses no threat to sea turtles (e.g., because no endangered turtles inhabit it). The panel majority misinterpreted the scope of the initial ban to which these exceptions apply. With the misinterpreted portion emphasized, the pertinent part of section 609 reads as follows:

> (b)(1) In General--The importation of shrimp or products from shrimp *which have been harvested with commercial fishing technology which may affect adversely [certain] species of sea turtles* shall be prohibited not later than May 1, 1991, except as provided in paragraph (2).

> The panel majority began its statutory interpretation by noting that the statutory language imposes an embargo on shrimp harvested in a certain manner, and that the embargo is inapplicable to shrimp that have not "been harvested with commercial fishing technology which may affect adversely" sea turtles. *Turtle Island*, 284 F.3d at 1291-92. The majority made a fatal error, however, in concluding that 609(b)(1) does not ban the importation of shrimp from uncertified countries if the particular shipment in question has been harvested with TED-equipped trawlers. The majority determined that: Because TED-caught shrimp have not been harvested with commercial fishing technology that may harm sea turtles, the statutory language does not support embargoing TED-caught shrimp from uncertified countries.

Id. at 1292.

But TED-caught shrimp *have* been harvested with commercial fishing technology that may harm sea turtles. Unlike acquacultured shrimp, or hand-caught shrimp,

mechanized commercial shrimping vessels drown some sea turtles even when those vessels are installed with TEDs. The government does not dispute that TEDs are at best 97% effective. Moreover, as Judge Newman explained, "mechanized commercial shrimp trawling constitutes a considerable threat to sea turtles, a threat that is not relieved when only some of the trawlers use TEDs." *Turtle Island*, at 1302 n. 4 (Newman, J., dissenting). Thus, mechanized *1376 commercial shrimp trawling is "commercial fishing technology that may harm sea turtles." This is so even if a particular trawler is installed with TEDs, and is particularly true where only part of a fleet has been installed with TEDs.

Section 609(b)(1) plainly bans the importation of shrimp harvested with mechanized trawlers unless, pursuant to section 609(b)(2), the harvesting nation obtains certification of its regulatory program (by equipping its entire fleet with TEDs) or harvests in waters uninhabited by endangered sea turtles. Thus, in addition to the text of section 609(b)(1), the statutory structure demands this interpretation; it is incongruous to interpret the scope of the embargo as narrower than its exceptions.

The panel majority's interpretation renders the certification exception a nullity. Certain shrimp-exporting countries that harvest in waters inhabited by endangered sea turtles have continued to obtain certification; however, they have done so under a condition of uncertainty as to the requirements of U.S. law, which provides a continuing incentive to maintain certification. We will not see the effect of the panel's decision on the incentives for certification and, ultimately, on the survival of sea turtles until this litigation has ended. Thereafter there will be no need for country certification, and the slaughter of the turtles can resume.

The panel majority's opinion flouts another of the traditional indicia of Congressional intent: legislative history. As Judge Newman's dissent explains, Congress sought to pursue two goals by enacting section 609. First,

Congress intended to protect sea turtles globally. *Turtle Island*, 284 F.3d at 1300 (Newman, J., dissenting). Second, Congress intended to assure that the domestic shrimp industry was protected from competition with shrimpers from nations with less stringent (and therefore less costly) regulations that did not require fleet-wide TED installation. *Id.*

The panel majority is unfaithful to both aspects of the legislative history. After stating that it was "unmistakably clear" that "the primary purpose of the bill was to protect the domestic shrimping industry, and not the sea turtle," *id.* at 1294, the majority concluded that section 609 does not ban particular shipments from uncertified countries of shrimp caught by vessels installed with TEDs, *id.* at 1295. According to the panel majority, TED installation "on vessels not serving the United States market" would not advance Congress's aim of "achieving parity for the domestic shrimp industry," because Congress was not concerned with placing domestic shrimpers on equal footing with foreign shrimpers in foreign markets. *Id.* But, of course, foreign shrimpers who are required to bear the cost of installing TEDs only on those ships serving the United States market also receive a competitive advantage in that market. By equipping only part of their fleet with TEDs, foreign shrimpers can lower the price charged to the United States market. By contrast, the domestic shrimp industry must have TEDs on all of their boats, and the cost of fleet-wide TED installation is reflected in the price they must charge shrimp consumers. The panel majority's interpretation therefore fails to comport with what it called the bill's "primary purpose," because it fails to protect domestic shrimpers from competition with foreign shrimpers who are subject to less rigorous, less costly regulations.[2]

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[2] The Georgia Shrimp Association and Boone Seafood, amici representing the domestic shrimp industry, explain that the shipment-by-shipment approach adopted by the panel majority puts "the domestic

*1377 Moreover, the panel majority's interpretation completely ignores the Congressional goal of protecting endangered sea turtles. To echo Judge Newman: "I do not agree with the majority that if there is a commercial aspect to legislation, the humanitarian purpose becomes irrelevant." *Id.* at 1302 (Newman, J., dissenting). The statute states that nations whose shrimpers want to sell shrimp in the United States must protect the turtles. This is a benevolent use of our market power; it hurts no one and rescues the turtles. It was entirely improper for the panel majority to interpret the statute inconsistently with this legislative purpose.

The majority's interpretation of section 609 contravenes the text of the ban embodied in section 609(b)(1), renders the certification exception embodied in section 609(b)(2) a nullity, and ignores the dual goals reflected in the legislative history. It contravenes every indicia of Congressional intent. As Senator Lott explained, section 609 was intended to "make sure that the other countries are taking the same measures we are." 135 Cong. Rec. 15,509 (1989).

Moreover, although the panel majority purported to afford no deference to the State Department's interpretation of section 609, it effectively deferred. The opinion stated:

> While Congress may have intended the administering agency to define which methods of harvesting shrimp may adversely affect sea turtles, we find no intent to delegate the power to define the scope of the embargo itself.

Turtle Island, 284 F.3d at 1293. But section 609(b)(1) defines the scope of the embargo with respect to whether shrimp have been "harvested with commercial fishing

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shrimpers at a huge competitive disadvantage." They state that the availability of cheap imported shrimp has already led to a situation where "large distributors and wholesalers now bypass domestic shrimpers such as Boone in order to double and triple their profits," and that this situation will worsen as countries opt out of certification and lower their fleet-wide costs.

technology which may affect adversely" endangered sea turtles. By summarily adopting the State Department's position that only some of the nation's fleet need be equipped with TEDs and that the legislation requires no more, the panel majority deferred to the State Department's unreasonable statutory construction. From 1991 to 1996, the State Department interpreted the embargo to apply to all shipments of shrimp from certain uncertified countries; thus, they adopted a nation-by-nation, not a shipment- by-shipment construction of the statute. In 1996, in response to pressure from some countries through the WTO, the State Department revised its Guidelines to require only shipment-by-shipment certification. As explained above, this interpretation of the statute is unreasonable. It is therefore entitled to no deference, particularly in light of the State Department's earlier, contrary interpretation.

The panel majority interpreted section 609 in a manner that violates axiomatic law regarding statutory interpretation. Mechanized commercial shrimp vessels are "commercial fishing technology which may affect adversely" endangered sea turtles. Congress clearly intended to ban the importation of shrimp harvested with mechanized shrimping vessels subject only to the nation- by-nation exceptions codified in section 609(b)(2). Thus, the legislation permits the importation of shrimp from only those countries that require the same restrictions we impose on our own fishing fleets. Those requirements apply irrespective of where the shrimp are ultimately sold.

The text of section 609(b)(1), the structure of the statute in light of the nation-by-nation exemptions embodied in section 609(b)(2), and the legislative history unequivocally *1378 require this interpretation. Neither the panel majority nor the State Department may properly disregard Congressional intent. The panel majority unreasonably construed a statute that was written to protect turtles so as not to protect them. This court should have granted the petition for rehearing en banc in order to construe the statute

consistently with Congressional intent. We therefore respectfully dissent from the denial of the petition for rehearing en banc.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

00-1569, -1581, -1582

TURTLE ISLAND RESTORATION NETWORK, TODD STEINER, THE AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, THE HUMANE SOCIETY OF THE UNITED STATES, AND THE SIERRA CLUB,

Plaintiffs-Appellants,

v.

DONALD L. EVANS, SECRETARY OF COMMERCE, COLIN L. POWELL, SECRETARY OF STATE, PAUL H. O'NEILL, SECRETARY OF THE TREASURY DAVID B. SANDLAW, ASSISTANT SECRETARY OF STATE FOR THE BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, PENELOPE D. DALTON, ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL MARINE FISHERIES SERVICE, AND ALAN P. LARSON, UNDER SECRETARY OF STATE FOR ECONOMIC, BUSINESS AND AGRICULTURAL AFFAIRS,

Defendants-Cross Appellants,

and

NATIONAL FISHERIES INSTITUTE, INC.,

Defendant-Cross Appellant.

JUDGMENT

ON APPEAL from the UNITED STAES COURT OF INTERNATIONAL TRADE

In Case No(s). 98-09-02818

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

REVERSED-IN-PART AND AFFIRMED-IN-PART

ENTERED BY ORDER OF THE COURT

Dated: March 20, 2002 /s/ Jan Horbaly

Jan Horbaly, Clerk

Issued as a Mandate: August 15, 2002

APPENDIX F

STATUTORY PROVISIONS

[Section 609, Title VI, of the Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act of 1990, Pub. L. 101-162, 103 Stat. 1037 (Nov. 21, 1989), codified at 16 U.S.C. § 1537 note]

(a) The Secretary of State, in consultation with the Secretary of Commerce, shall, with respect to those species of sea turtles the conservation of which is the subject of regulations promulgated by the Secretary of Commerce on June 29, 1987--

(1) initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations for the protection and conservation of such species of sea turtles;

(2) initiate negotiations as soon as possible with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which, as determined by the Secretary of Commerce, may affect adversely such species of sea turtles, for the purpose of entering into bilateral and multilateral treaties with such countries to protect such species of sea turtles;

(3) encourage such other agreements to promote the purposes of this section with other nations for the protection of specific ocean and land regions which are of special significance to the health and stability of such species of sea turtles;

(4) initiate the amendment of any existing international treaty for the protection and conservation of such species of sea turtles to which the United States is a party in order to make such treaty consistent with the purposes and policies of this section; and

(5) provide to the Congress by not later than one year after the date of enactment of this section [Nov. 21, 1989]

(A) a list of each nation which conducts commercial shrimp fishing operations within the geographic range of distribution of such sea turtles;

(B) a list of each nation which conducts commercial shrimp fishing operations which may affect adversely such species of sea turtles; and

(C) a full report on--

(i) the results of his efforts under this section; and

(ii) the status of measures taken by each nation listed pursuant to paragraph (A) or (B) to protect and conserve such sea turtles.

(b)(1) In general.--The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles shall be prohibited not later than May 1, 1991, except as provided in paragraph (2).

(2) Certification procedure.--The ban on importation of shrimp or products from shrimp pursuant to paragraph (1) shall not apply if the President shall determine and certify to the Congress not later than May 1, 1991, and annually thereafter that--

(A) the government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and

(B) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by

United States vessels in the course of such harvesting; or

(C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

[5 U.S.C.] § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

[19 U.S.C.] § 3511. Approval and entry into force of Uruguay Round Agreements

(a) Approval of agreements and statement of administrative action

Pursuant to section 2903 of this title and section 2191 of this title, the Congress approves--

(1) the trade agreements described in subsection (d) of this section resulting from the Uruguay Round of multilateral trade negotiations under the auspices of the General Agreement on Tariffs and Trade, entered into on April 15, 1994, and submitted to the Congress on September 27, 1994; and

(2) the statement of administrative action proposed to implement the agreements that was submitted to the Congress on September 27, 1994.

(b) Entry into force

At such time as the President determines that a sufficient number of foreign countries are accepting the obligations of the Uruguay Round Agreements, in accordance with article XIV of the WTO Agreement, to ensure the effective operation of, and adequate benefits for the United States under, those Agreements, the President may accept the Uruguay Round Agreements and implement article VIII of the WTO Agreement.

(c) Authorization of appropriations

There are authorized to be appropriated annually such sums as may be necessary for the payment by the United States of its share of the expenses of the WTO.

(d) Trade agreements to which this Act applies

Subsection (a) of this section applies to the WTO Agreement and to the following agreements annexed to that Agreement:

(1) The General Agreement on Tariffs and Trade 1994.

(2) The Agreement on Agriculture.

(3) The Agreement on the Application of Sanitary and Phytosanitary Measures.

(4) The Agreement on Textiles and Clothing.

(5) The Agreement on Technical Barriers to Trade.

(6) The Agreement on Trade-Related Investment Measures.

(7) The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

(8) The Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994.

(9) The Agreement on Preshipment Inspection.

(10) The Agreement on Rules of Origin.

(11) The Agreement on Import Licensing Procedures.

(12) The Agreement on Subsidies and Countervailing Measures.

(13) The Agreement on Safeguards.

(14) The General Agreement on Trade in Services.

(15) The Agreement on Trade-Related Aspects of Intellectual Property Rights.

(16) The Understanding on Rules and Procedures Governing the Settlement of Disputes.

(17) The Agreement on Government Procurement.

(18) The International Bovine Meat Agreement.

[19 U.S.C.] § 3512. Relationship of agreements to United States law and State law

(a) Relationship of agreements to United States law

(1) United States law to prevail in conflict

No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.

(2) Construction

Nothing in this Act shall be construed--

(A) to amend or modify any law of the United States, including any law relating to--

(i) the protection of human, animal, or plant life or health,

(ii) the protection of the environment, or

(iii) worker safety, or

(B) to limit any authority conferred under any law of the United States, including section 2411 of this title, unless specifically provided for in this Act.

(b) Relationship of agreements to State law

(1) Federal-State consultation

(A) In general

On December 8, 1994, the President shall, through the intergovernmental policy advisory committees on trade established under section 2114c(2)(A) of this title, consult with the States for the purpose of achieving conformity of State laws and practices with the Uruguay Round Agreements.

(B) Federal-State consultation process

The Trade Representative shall establish within the Office of the United States Trade Representative a Federal-State consultation process for addressing issues relating to the Uruguay Round Agreements that directly

relate to, or will potentially have a direct effect on, the States. The Federal-State consultation process shall include procedures under which--

(i) the States will be informed on a continuing basis of matters under the Uruguay Round Agreements that directly relate to, or will potentially have a direct impact on, the States;

(ii) the States will be provided an opportunity to submit, on a continuing basis, to the Trade Representative information and advice with respect to matters referred to in clause (i); and

(iii) the Trade Representative will take into account the information and advice received from the States under clause (ii) when formulating United States positions regarding matters referred to in clause (i).

The Federal Advisory Committee Act (5 U.S.C.App.) shall not apply to the Federal-State consultation process established by this paragraph.

(C) Federal-State cooperation in WTO dispute settlement

(i) When a WTO member requests consultations with the United States under Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes referred to in section 3511(d)(16) of this title (hereafter in this subsection referred to as the "Dispute Settlement Understanding") concerning whether the law of a State is inconsistent with the obligations undertaken by the United States in any of the Uruguay Round Agreements, the Trade Representative shall notify the Governor of the State or the Governor's designee, and the chief legal officer of the jurisdiction whose law is the subject of the consultations, as soon as possible after the request is received, but in no event later than 7 days thereafter.

(ii) Not later than 30 days after receiving such a request for consultations, the Trade Representative shall consult with representatives of the State concerned regarding the matter. If the consultations involve the laws of a large number of States, the Trade Representative may consult with an appropriate group of representatives of the States concerned, as determined by those States.

(iii) The Trade Representative shall make every effort to ensure that the State concerned is involved in the development of the position of the United States at each stage of the consultations and each subsequent stage of dispute settlement proceedings regarding the matter. In particular, the Trade Representative shall--

(I) notify the State concerned not later than 7 days after a WTO member requests the establishment of a dispute settlement panel or gives notice of the WTO member's decision to appeal a report by a dispute settlement panel regarding the matter; and

(II) provide the State concerned with the opportunity to advise and assist the Trade Representative in the preparation of factual information and argumentation for any written or oral presentations by the United States in consultations or in proceedings of a panel or the Appellate Body regarding the matter.

(iv) If a dispute settlement panel or the Appellate Body finds that the law of a State is inconsistent with any of the Uruguay Round Agreements, the Trade Representative shall consult with the State concerned in an effort to develop a mutually agreeable response to the report of the panel or the Appellate Body and shall make every effort to ensure that the State concerned is involved

in the development of the United States position regarding the response.

(D) Notice to States regarding consultations on foreign subcentral government laws

(i) Subject to clause (ii), the Trade Representative shall, at least 30 days before making a request for consultations under Article 4 of the Dispute Settlement Understanding regarding a subcentral government measure of another WTO member, notify, and solicit the views of, appropriate representatives of each State regarding the matter.

(ii) In exigent circumstances clause (i) shall not apply, in which case the Trade Representative shall notify the appropriate representatives of each State not later than 3 days after making the request for consultations referred to in clause (i).

(2) Legal challenge

(A) In general

No State law, or the application of such a State law, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for the purpose of declaring such law or application invalid.

(B) Procedures governing action

In any action described in subparagraph (A) that is brought by the United States against a State or any subdivision thereof--

(i) a report of a dispute settlement panel or the Appellate Body convened under the Dispute Settlement Understanding regarding the State law, or the law of any political subdivision thereof, shall not be considered as binding or otherwise accorded deference;

(ii) the United States shall have the burden of proving that the law that is the subject of the action, or the application of that law, is inconsistent with the agreement in question;

(iii) any State whose interests may be impaired or impeded in the action shall have the unconditional right to intervene in the action as a party, and the United States shall be entitled to amend its complaint to include a claim or cross-claim concerning the law of a State that so intervenes; and

(iv) any State law that is declared invalid shall not be deemed to have been invalid in its application during any period before the court's judgment becomes final and all timely appeals, including discretionary review, of such judgment are exhausted.

(C) Reports to Congressional committees

At least 30 days before the United States brings an action described in subparagraph (A), the Trade Representative shall provide a report to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate--

(i) describing the proposed action;

(ii) describing efforts by the Trade Representative to resolve the matter with the State concerned by other means; and

(iii) if the State law was the subject of consultations under the Dispute Settlement Understanding, certifying that the Trade Representative has substantially complied with the requirements of paragraph (1)(C) in connection with the matter.

Following the submission of the report, and before the action is brought, the Trade Representative shall

consult with the committees referred to in the preceding sentence concerning the matter.

(3) "State law" defined

For purposes of this subsection--

(A) the term "State law" includes--

(i) any law of a political subdivision of a State; and

(ii) any State law regulating or taxing the business of insurance; and

(B) the terms "dispute settlement panel" and "Appellate Body" have the meanings given those terms in section 3531 of this title.

(c) Effect of agreement with respect to private remedies

(1) Limitations

No person other than the United States--

(A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or

(B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement.

(2) Intent of Congress

It is the intention of the Congress through paragraph (1) to occupy the field with respect to any cause of action or defense under or in connection with any of the Uruguay Round Agreements, including by precluding any person other than the United States from bringing any action against any State or political subdivision thereof or raising any defense to the application of State law under or in connection with any of the Uruguay Round Agreements--

(A) on the basis of a judgment obtained by the United States in an action brought under any such agreement; or

(B) on any other basis.

(d) Statement of administrative action

The statement of administrative action approved by the Congress under section 3511(a) of this title shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.

APPENDIX G

NOTICES

DEPARTMENT OF STATE

[Public Notice 2368]
[61 FR 17342]

Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations

Friday, April 19, 1996

*17342 SUMMARY: Section 609 of Public Law 101-162 ("Section 609") provides that shrimp harvested with technology that may adversely affect certain sea turtles may not be imported into the United States unless there is an annual certification to Congress that the harvesting nation has a regulatory program and an incidental take rate comparable to that of the United States, or, alternatively, that the fishing environment in the harvesting nation does not pose a threat of the incidental taking of sea turtles. This notice revises guidelines used by the Department of State in making such certifications, in accordance with an order issued by the U.S. Court of International Trade on December 29, 1995.

EFFECTIVE DATE: May 1, 1996.

FOR FURTHER INFORMATION CONTACT: Mr. Hollis Summers, Office of Marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State, Washington, DC 20520, telephone number (202) 647- 3940.

SUPPLEMENTARY INFORMATION: Section 609 provides that shrimp or products from shrimp harvested with commercial fishing technology that may adversely affect certain species of sea turtles protected under U.S. laws and

regulations may not be imported into the United States unless the President certifies to Congress by May 1, 1991, and annually thereafter, that:

a. The government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and

b. The average rate of that incidental taking by vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or

c. The particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

The President has delegated to the Secretary of State the authority to make certifications pursuant to Section 609 (Memorandum of December 19, 1990; 56 FR 357; January 4, 1991).

The relevant species of sea turtles are: loggerhead (Caretta caretta), Kemp's ridley (Lepidochelys kempi), green (Chelonia mydas), leatherback (Dermochelys coriacea) and hawksbill (Erermochelys imbricata).

The Department of State had previously determined that Congress intended Section 609 to apply only to certain nations in the wider Caribbean/*17343 western Atlantic region. However, on December 29, 1995, Judge Thomas J. Aquilino, Jr., of the U.S. Court of International Trade, issued an order in Earth Island Institute v. Christopher (CIT 94-06-00321) requiring that Section 609 applies to shrimp harvested in all foreign nations.

The U.S. program. The foundation of the U.S. program governing the incidental taking of sea turtles in the course of shrimp harvesting is the requirement that commercial shrimp trawl vessels use turtle excluder devices (TEDs), approved in accordance with standards established by the U.S. National

Marine Fisheries Service (NMFS), in areas and at times when there is a likelihood of intercepting sea turtles. The goal of this program is to protect sea turtle populations from further decline byreducing the incidental mortality of sea turtles in commercial shrimp trawl operations.

The commercial shrimp trawl fisheries in the United States in which there is a likelihood of intercepting sea turtles occur in the temperate waters of the Gulf of Mexico and the Atlantic Ocean from North Carolina to Texas. With very limited exceptions, all U.S. commercial shrimp trawl vessels operating in these waters must use approved TEDs at all times and in all areas. The only exceptions to this requirement are as follows:

a. Vessels equipped exclusively with the following special types of gear are not required to use TEDs because the nature of their operations does not pose a threat of the incidental drowning of sea turtles: barred beam trawls and/or roller trawls, wing nets, skimmer trawls, and pusher-head trawls. Single try nets are test nets, used briefly to test for shrimp concentrations, need not have TEDs.

b. Vessels whose nets are retrieved exclusively by manual rather than mechanical means are not required to use TEDs because the lack of a mechanical retrieval system necessarily limits tow times to a short duration so as not to pose a threat of the incidental drowning of sea turtles. This exemption applies only to vessels that have no power or mechanical-advantage trawl retrieval system.

c. In exceptional circumstances, where NMFS determines that the use of TEDs would be impracticable because of special environmental conditions such as the presence of algae, seaweed, or debris, or that TEDs would be ineffective in protecting sea turtles in particular areas, vessels are

permitted to restrict tow times instead of using TEDs. Such exceptions are generally limited to 30 days. In practice, NMFS has permitted such exceptions only rarely.

With these limited exceptions, all other commercial shrimp trawl vessels operating in waters subject to U.S. jurisdiction in which there is a likelihood of intercepting sea turtles must use TEDs at all times. For more information on the U.S. program governing the incidental taking of sea turtles in the course of commercial shrimp trawl harvesting, see 50 C.F.R. 227.17 and 50 C.F.R. 227.72(e).

Shrimp Harvested in a Manner Not Harmful to Sea Turtles. The Department of State has determined that import prohibitions imposed pursuant to Section 609 do not apply to shrimp or products of shrimp harvested under the following conditions, since such harvesting does not adversely affect sea turtles:

a. Shrimp harvested in an aquaculture facility in which the shrimp spend at least 30 days in ponds prior to being harvested.

b. Shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States.

c. Shrimp harvested exclusively by means that do not involve the retrieval of fishing nets by mechanical devices or by vessels using gear that, in accordance with the U.S. program described above, would not require TEDs.

d. Species of shrimp, such as the pandalid species, harvested in areas in which sea turtles do not occur.

Shrimp Exporter's Declaration. The Department of State has determined that, in order to achieve effective implementation of Section 609 on a world-wide basis, beginning May 1, 1996, all shipments of shrimp and products of shrimp into the United States must be accompanied by a declaration (DSP-121, revised) attesting that the shrimp

accompanying the declaration was harvested either under conditions that do not adversely affect sea turtles (as defined above) or in waters subject to the jurisdiction of a nation currently certified pursuant to Section 609. All declaration must be signed by the exporter of the shrimp. A government official of the harvesting nation must also sign those declarations asserting that the accompanying shrimp was harvested under conditions that do not adversely affect sea turtles. The declaration must accompany the shipment through all states of the export process, including in the course of any transshipments and of any transformation of the original product. The Department of State will make copies of the declaration readily available; local reproduction of the declarations is fully acceptable.

Date of Export. The Department of State has further determined that import prohibitions imposed in 1996 pursuant to Section 609 shall not apply to shipments of shrimp and products of shrimp with a date of export prior to May 1, 1996. In subsequent years, import prohibitions shall not apply to shipments of shrimp and products of shrimp with a date of export falling at a time in which the harvesting nation is currently certified pursuant to Section 609.

Country of Origin. For purposes of implementing Section 609, the country of origin shall be deemed to be the nation in whose waters the shrimp is harvested, whether or not the harvesting vessel is flying the flag of another nation.

Guidelines For Determining Comparability

I. Certification Pursuant to Section 609(b)(2)(C)

Section 609(b)(2)(C) authorizes the Department of State to certify a harvesting nation if the particular fishing environment of the harvesting nation does not pose a threat of incidental taking of sea turtles in the course of commercial shrimp trawl harvesting. Accordingly, the Department of State shall certify any harvesting nation meeting the following criteria without the need for action on the part of the government of the harvesting nation:

a. Any harvesting nation without any of the relevant species of sea turtles occurring in waters subject to its jurisdiction;

b. Any harvesting nation that harvests shrimp exclusively by means that do not pose a threat to sea turtles, e.g., any nation that harvests shrimp exclusively by artisanal means;

c. Any nation whose commercial shrimp trawling operations take place exclusively in waters subject to its jurisdiction in which sea turtles do not occur.

II. Other Certifications

The Department of State shall certify any other harvesting nation by May 1, 1996, and annually thereafter, only if the government of that nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of sea turtles in the course of commercial shrimp trawl harvesting that is comparable to that of the United States and if the average take rate of that incidental taking by vessels of the *17344 harvesting nation is comparable to the average take rate of incidental taking of sea turtles by United States vessels in the course of such harvesting.

a. Regulatory Program. The Department of State shall assess regulatory programs, as described in the documentary evidence provided by the governments of harvesting nations, for comparability with the U.S. program. Certification shall be made if a program includes the following:

1. Required Use of TEDs--a requirement that all commercial shrimp trawl vessels operating in waters in which there is a likelihood of intercepting sea turtles use TEDs at all times. TEDs must be comparable in effectiveness to those used in the United States. Any exceptions to this requirement must be comparable to those of the U.S. program described above; and

2. Enforcement--a credible enforcement effort that includes monitoring for compliance and appropriate sanctions.

b. Incidental Take. Average incidental take rates will be deemed comparable if the harvesting nation requires the use of TEDs in a manner comparable to that of the U.S. program described above.

c. Additional Considerations.

1. Form--A regulatory program may be in the form of regulations promulgated by the government of the harvesting nation and having the force of law. If the legal system and industry structure of the harvesting nation permit voluntary arrangements between government and the fishing industry, such an arrangement may be acceptable so long as there is a governmental mechanism to monitor compliance with the arrangement and to impose penalties for noncompliance, and confirmation that the fishing industry is complying with the arrangement.

2. Documentary Evidence--Documentary evidence may be in the form of copies of the relevant laws, regulations or decrees. If the regulatory program is in the form of a government-industry arrangement, then a copy of the arrangement is required. Harvesting nations are encouraged to provide, to the extent practicable, information relating to the extent of shrimp harvested by means of aquaculture.

3. Additional Turtle Protection Measures--The Department of State recognizes that sea turtles require protection throughout their life cycle, not only in the course of commercial shrimp trawl harvesting. In making the comparability determination, the Department shall also take into account other measures the harvesting nation undertakes to protect sea turtles, including national programs to protect nesting beaches and other habitat, prohibitions on the directed take of sea turtles, national enforcement and compliance programs, and participation in any international agreement for the protection and conservation of sea turtles.

4. Consultations--The Department of State will engage in ongoing consultations with harvesting nations. The Department recognizes that, as turtle protection programs develop, additional information will be gained about the interaction between turtle populations and shrimp fisheries. These Guidelines may be revised in the future to take into consideration that and other information, as well as to take into account changes in the U.S. program.

IV. Related Determinations

a. Any harvesting nation that is not certified on May 1 of any year may be certified prior to the following May 1 at such time as the harvesting nation meets the criteria necessary for certification. Conversely, any harvesting nation that is certified on May 1 of any year may have its certification revoked prior to the following May 1 at such time as the harvesting nation no longer meets those criteria.

b. These Guidelines, as revised, do not represent any substantive change in criteria for certification of harvesting nations, previously determined to be covered by Section 609, that do not have waters subject to their jurisdiction outside the wider Caribbean/western Atlantic region. For harvesting nations that have waters subject to their jurisdiction both in the wider Caribbean/western Atlantic region and elsewhere (e.g., in the Pacific ocean), certification will depend on application of the criteria in Sections II and III above in relation to all waters subject to their jurisdiction.

As a matter relating to the foreign affairs function, these guidelines are exempt from the notice, comment, and delayed effectiveness provisions of the Administrative Procedures Act. This action is exempt from Executive Order 12866, and is not subject to the requirements of the Regulatory Flexibility Act.

Dated: April 9, 1996.

For the Secretary of State.

Eileen B. Claussen,

Assistant Secretary for Oceans and International Environmental and Scientific Affairs.

[FR Doc. 96-9604 Filed 4-18-96; 8:45 am]
BILLING CODE 4710-09-M

APPENDIX H

NOTICES

DEPARTMENT OF STATE

[Public Notice 2876]
[63 FR 46094]

Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations

Friday, August 28, 1998

*46094 SUMMARY: Section 609 of Public Law 101-162 ("Section 609") provides that shrimp harvested with technology that may adversely affect certain species of sea turtles may not be imported into the United States unless there is an annual certification to Congress that the harvesting nation has a regulatory program and an incidental take rate comparable to that of the United States, or, alternatively, that the fishing environment in the harvesting nation does not pose a threat to the incidental taking of sea turtles. This notice revises the April 19, 1996 guidelines used by the Department of State in making such certification, in response to a decision made by the U.S. Court of Appeals for the Federal Circuit on June 4, 1998.

EFFECTIVE DATE: August 28, 1998.

FOR FURTHER INFORMATION CONTACT: Mr. Bill Gibbons-Fly, Office of Marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State, Washington DC 20520, telephone number (202) 647- 2335.

SUPPLEMENTARY INFORMATION: Section 609 provides that shrimp or products from shrimp harvested with commercial fishing technology that may adversely affect

certain species of sea turtles protected under U.S. law and regulations may not be imported into the United States unless the President certifies to Congress by May 1, 1991, and annually thereafter, that:

a. The government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and

b. The average rate of that incidental taking by vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or

c. The particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

The President has delegated to the Secretary of State the authority to make certifications pursuant to Section 609 (Memorandum of December 19, 1990; 56 FR 357; January 4, 1991).

The relevant species of sea turtles are: loggerhead (Coretta caretta), Kemp's ridley (Lepidochelys kempi), green (Chelonia mydas), leatherback ((Dermochelys coriacea) and hawksbill (Erermochelys imbricata).

On October 8, 1996, the Court of International Trade held that Section 609 could not be enforced by the Department of State so as to allow entry into the United States of any shrimp or products from shrimp harvested by citizens or vessels of nations which had not been certified in accordance with Section 609. Earth Island Institute v. Christopher, 942, F. Supp. 597 (CIT 1996).

On November 25, 1996, the Court of International Trade issued an opinion which clarified the October 1996 ruling and stated that the State Department could allow entry into the United States of any shrimp or products from shrimp harvested by citizens or vessels of nations which have not

been certified in accordance with Section 609 so long as the harvest was accomplished in a manner which did not adversely affect sea turtles (e.g. shrimp harvested in an aquaculture facility under certain circumstances; shrimp harvested by manual rather than by mechanical methods; or shrimp harvested in areas in which sea turtles do not occur). However, shrimp and products from shrimp harvested with turtle excluder devices (TEDs) could not be imported unless the harvesting nation was certified in accordance with Section 609. Earth Island Institute v. Christopher, 948 F. Supp. 1062 (CIT 1996).

On June 4, 1998, the U.S. Court of Appeals for the Federal Circuit vacated the trial court's October 8, 1996 and November 25, 1996 rulings and held *46095 that the trial court lacked jurisdiction because the plaintiffs had previously withdrawn their motion on which the court based its decisions.

In response to the June 4, 1998 decision, the Department of State takes this opportunity to reaffirm the guidelines issued on April 19, 1996 (FR Vo.l. 61, No. 77, April 19, 1996), except as modified herein.

The Department of State reinstates its determination that the harvesting of shrimp with TEDs does not adversely affect sea turtle species and that TED- caught shrimp is therefore not subject to the import prohibition created by Section 609(b)(1). As described below, however, the Department of State has decided to establish several conditions and incentives relating to the importation of such shrimp that are intended to address concerns that have been raised about the effect of this determination on the conservation of sea turtle species.

These concerns are of two basic kinds. First, there is a concern that foreign harvesters will fraudulently claim that shrimp has been harvested with TEDs. To protect against such fraud, the guidelines issued on April 19, 1996 already require every shipment of shrimp entering the U.S. market to

be accompanied by a completed DSP-121 form indicating either that the shrimp was harvested in a certified nation or was harvested in an uncertified nation under one of the conditions that do not adversely affect sea turtles species. For shrimp harvested in certified nations, only the exporter must certify that the shrimp was harvested in the manner indicated on the form. For shrimp harvested in uncertified nations, both the exporter and a government official in the harvesting nation must so certify. The Department of State has decided to add to these safeguards by undertaking regular examinations of the procedures that governments of uncertified nations have put in place for verifying the accurate completion of the DSP-121 forms. If, upon our review, such governments do not demonstrate that they have adequate procedures in place, the Department will instruct the Customs Service not to permit the importation of TED-caught shrimp harvested in that nation.

Second, there is a concern that foreign nations that have established regulatory programs governing the incidental taking of sea turtles in the course of shrimp trawl harvesting that are comparable to the U.S. program will abandon or limit those programs so that only shrimp vessels harvesting shrimp for export to the U.S. market will actually use TEDs. Similarly, a concern has been raised that other nations that may be considering the adoption of such programs may instead adopt a policy of using TEDs only on vessels harvesting shrimp for export to the U.S. market.

As a matter of policy, the Department of State is of the view that foreign governments should require TEDs to be used on shrimp trawl vessels wherever there is a likelihood of intercepting sea turtles. Available evidence does not indicate that a decision to permit the importation of TED-caught shrimp from uncertified nations will cause foreign governments to abandon (or to refrain from adopting) regulatory programs requiring TEDs to be used in this manner. During the earlier period in which the United States permitted importation of TED-caught shrimp from

uncertified nations, no foreign nation that had established such a program abandoned or limited its program. Indeed, some Central American nations expanded their TEDs programs during that time to include their Pacific as well as Caribbean coasts.

Nevertheless, in order to ensure that a decision to permit the importation of TED-caught shrimp from uncertified nations does not undermine the establishment of such programs, the Department of State will review the effects of the decision every six months for a three-year period beginning May 1, 1999. If evidence indicates that the decision has adversely affected sea turtle species; e.g., by prompting foreign governments to abandon or limit country-wide TEDs programs or to fail to adopt such programs, the Department will reassess the decision.

The Department has further decided to increase its efforts to protect and conserve sea turtles through the negotiation and implementation of multilateral agreements. To this end, the Department shall strive to secure the entry into force of the Inter-American Convention for the Protection and Conservation of Sea Turtles throughout the Western Hemisphere as early as possible. The Department will also intensify efforts to negotiate comparable agreements for other regions where sea turtles are at considerable risk, including from shrimp trawl fishing, beginning with the Indian Ocean region.

For the sake of clarity, the April 19, 1996 guidelines are restated below with certain modifications.

The U.S. Program. The foundation of the U.S. program governing the incidental taking of sea turtles in the course of shrimp harvesting is the requirement that commercial shrimp trawl vessels use TEDs approved in accordance with standards established by the U.S. National Marine Fisheries Service (NMFS), in areas and at times when there is a likelihood of intercepting sea turtles. The goal of this program is to protect sea turtle populations from further

decline by reducing the incidental mortality of sea turtles in commercial shrimp trawl operations.

The commercial shrimp trawl fisheries in the United States in which there is a likelihood of intercepting sea turtles occur in the temperate waters of the Gulf of Mexico and the Atlantic Ocean from North Carolina to Texas. With very limited exceptions, all U.S. commercial shrimp trawl vessels operating in these waters must use approved TEDs at all times and in all areas. The only exceptions to this requirement are as follows:

a. Vessels equipped exclusively with the following special types of gear and deployed with certain restricted tow times are not required to use TEDs because the nature of their operations does not pose a threat of the incidental drowning of sea turtles: barred beam trawls and/or roller trawls, wing nets, skimmer trawls, and pusher-head trawls. Single try nets (with less than a twelve foot headrope and fifteen foot rope) and test nets, used briefly to test for shrimp concentrations, need not have TEDs.

b. Vessels whose nets are retrieved exclusively by manual rather than mechanical means are not required to use TEDs because the lack of a mechanical retrieval system necessarily limits tow times to a short duration so as not to pose a threat of the incidental drowning of sea turtles. This exemption applies only to vessels that have no power or mechanical-advantage trawl retrieval system.

c. In exceptional circumstances, where NMFS determines that the use of TEDs would be impracticable because of special environmental conditions such as the presence of algae, seaweed, or debris, or that TEDs would be ineffective in protecting sea turtles in particular areas, vessels are permitted to restrict tow times instead of using TEDs. Such exceptions are generally limited to two periods of 30 days each. In practice, NMFS has permitted such exceptions only rarely.

With these limited exceptions, all other commercial shrimp trawl vessels operating in waters subject to U.S. jurisdiction in which there is a likelihood of intercepting sea turtles must use TEDs at all times. For more information on the U.S. program governing the incidental taking of sea turtles in the course of commercial shrimp trawl harvesting, see 50 CFR 227.17 and 50 CFR 227.72(e).*46096

Shrimp Harvested in a Manner Not Harmful to Sea Turtles. The Department prohibitions imposed pursuant to Section 609 do not apply to shrimp or products of shrimp harvested under the following conditions, since such harvesting does not adversely affect sea turtles:

a. Shrimp harvested in an aquaculture facility in which the shrimp spend at least 30 days in pond prior to being harvested.

b. Shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States.

c. Shrimp harvested exclusively by means that do not involve the retrieval of fishing nets by mechanical devices or by vessels using gear that, in accordance with the U.S. program described above, would not require TEDs.

d. Species of shrimp, such as the pandalid species, harvested in areas in which sea turtles do not occur.

Shrimp Exporter's/Importer's Declaration. The requirement that all shipments of shrimp and products of shrimp imported into the United States must be accompanied by a declaration (DSP-121, revised) became effective as of May 1, 1996 and remains effective. The DSP-121 attests that the shrimp accompanying the declaration was harvested either under conditions that do not adversely affect sea turtles (as defined above) or in waters subject to the jurisdiction of a nation currently certified pursuant to Section 609. All declarations must be signed by the exporter.

The requirement that a government official of the harvesting nation not currently certified pursuant to Section

609 must also sign the DSP-121 asserting that the accompanying shrimp was harvested under conditions that do not adversely affect sea turtles species remains effective. Notice is hereby given that the Department intends to conduct periodic reviews of the system that such foreign governments have put in place to verify the statements made on the DSP-121 form in order to protect against fraud. The declaration must accompany the shipment through all stages of the export process, including, any transformation of the original product and any shipment through any intermediary country. As before, the Department of State will make copies of the declaration readily available; local reproduction of the declarations is fully acceptable.

Date of Export. Import prohibitions shall not apply to shipments of shrimp and products of shrimp with a date of export falling at a time in which the harvesting nation is currently certified pursuant to Section 609.

Country of Origin. For purposes of implementing Section 609, the country of origin shall be deemed to be the nation in whose waters the shrimp is harvested, whether or not the harvesting vessel is flying the flag of another nation.

Guidelines for Determining Comparability

I. Certification Pursuant to Section 609(b)(2)(C)

Section 609(b)(2)(C) authorizes the Department of State to certify a harvesting nation if the particular fishing environment of the harvesting nation does not pose a threat of incidental taking of sea turtles in the course of commercial shrimp trawl harvesting. Accordingly, the Department shall certify any harvesting nation meeting the following criteria without the need for action on the part of the government of the harvesting nation:

a. Any harvesting nation without any of the relevant species of sea turtles occurring in waters subject to its jurisdiction;

b. Any harvesting nation that harvests shrimp exclusively by means that do not pose a threat to sea turtles, e.g., any nation that harvests shrimp exclusively by artisanal means;

c. Any nation whose commercial shrimp trawling operations take place exclusively in waters subject to its jurisdiction in which sea turtles do not occur.

II. Other Certifications

The Department of State shall certify any other harvesting nation by May 1st of each year only if the government of that nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of sea turtles in the course of commercial shrimp trawl harvesting that is comparable to that of the United States and if the average take rate of that incidental taking by vessels of the harvesting nation is comparable to the average take rate of incidental taking of sea turtles by United States vessels in the course of such harvesting.

a. Regulatory Program. The Department of State shall assess regulatory programs, as described in the documentary evidence provided by the governments of harvesting nations, for comparability with the U.S. program. Certification shall be made if a program includes the following:

1. Required Use of TEDS--a requirement that all commercial shrimp trawl vessels operating in waters in which there is a likelihood of intercepting sea turtles use TEDs at all times. TEDs must be comparable in effectiveness to those used in the United States. Any exceptions to this requirement must be comparable to those of the U.S. program described above; and

2. Enforcement--a credible enforcement effort that includes monitoring for compliance and appropriate sanctions.

b. Incidental Take. Average incidental take rates will be deemed comparable if the harvesting nation requires the use of TEDs in a manner comparable to that of the U.S. program described above.

c. Additional Considerations. 1. Form--A regulatory program may be in the form of regulations promulgated by the government of the harvesting nation and having the force of law. If the legal system and industry structure of the harvesting nation permit voluntary arrangements between government and the fishing industry, such an arrangement may be acceptable so long as there is a governmental mechanism to monitor compliance with the arrangement and to impose penalties for noncompliance, and confirmation that the fishing industry is complying with the arrangement.

2. Documentary Evidence--Documentary evidence may be in the form of copies of the relevant laws, regulations or decrees. If the regulatory program is in the form of a government-industry arrangement, then a copy of the arrangement is required. Harvesting nations are encouraged to provide, to the extent practicable, information relating to the extent of shrimp harvested by means of aquaculture.

3. Additional Turtle Protection Measures--The Department of State recognizes that sea turtles require protection throughout their life cycle, not only when they are threatened during the course of commercial shrimp trawl harvesting. In making the comparability determination, the Department shall also take into account other measures the harvesting nation undertakes to protect sea turtles, including national programs to protect nesting beaches and other habitat, prohibitions on the directed take of sea turtles, national enforcement and compliance programs, and participation in any international agreement for the protection and conservation of sea turtles. The Department of State relies on the technical expertise of NMFS to evaluate threats to sea turtles and the sea turtle protection programs of the

harvesting nations in order to assist in making the comparability determination.*46097

4. Consultations--The Department of State will engage in ongoing consultations with harvesting nations. The Department recognizes that, as turtle protection programs develop, additional information will be gained about the interaction between turtle populations and shrimp fisheries. These Guidelines may be revised in the future to take into consideration that and other information, as well as to take into account changes in the U.S. program.

In addition, the Department seeks public comment on the best ways to implement both these guidelines and Section 609 as a whole and may revise these guidelines in the future accordingly.

III. Related Determination

Any harvesting nation that is not certified on May 1 of any year may be certified prior to the following May 1 at such time as the harvesting nation meets the criteria necessary for certification. Conversely, any harvesting nation that is certified on May 1 of any year may have its certification revoked prior to the following May 1 at such time as the harvesting nation no longer meets those criteria.

As a matter relating to the foreign affairs function, these guidelines are exempt from the notice, comment, and delayed effectiveness provisions of the Administrative Procedures Act. This action is exempt from Executive Order 12866, and is not subject to the requirements of the Regulatory Flexibility Act.

Dated: August 18, 1998.
Stuart E. Eizenstat,
Under Secretary for Economic, Business and Agricultural Affairs.
[FR Doc. 98-23121 Filed 8-27-98; 8:45 am]
BILLING CODE 4710-09-M

APPENDIX I

NOTICES

DEPARTMENT OF STATE

[Public Notice 3086]
[64 FR 36946]

Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations

Thursday, July 8, 1999

*36946 SUMMARY: Section 609 of Public Law 101-162 ("Section 609") provides that shrimp harvested with technology that may adversely affect certain species of sea turtles may not be imported into the United States. This import prohibition does not apply if the Department of State certifies to Congress that the harvesting nation has a regulatory program and an incidental take rate comparable to that of the United States, or, alternatively, that the fishing environment in the harvesting nation does not pose a threat of the incidental taking of sea turtles. On March 25, 1999, in response to recommendations of the Dispute Settlement Body of the World Trade Organization, the Department of State published a notice in the Federal Register (Public Notice 3013, 64 FR 14481) proposing several revisions to the guidelines issued by the Department on August 28, 1998 for use in making such certifications. In that Federal Register Notice, the Department also requested public comment on certain aspects of those proposals, in accordance with provisions of the Uruguay Round Trade Agreements Act, 16 U.S.C. 3533. This notice reviews and responds to the comments received and provides the current version of the

guidelines, which include a number of modifications made pursuant to those comments.

EFFECTIVE DATE: July 8, 1999.

FOR FURTHER INFORMATION CONTACT: Mr. David Hogan, Office of Marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State, Washington D.C., telephone number (202) 647-2335.

I. SUPPLEMENTARY INFORMATION:

A. Section 609

Section 609 provides that shrimp or products from shrimp harvested with commercial fishing technology that may adversely affect certain species of sea turtles protected under U.S. law and regulations may not be imported into the United States. This import prohibition does not apply if the President certifies to Congress by May 1, 1991, and annually thereafter, that:

a. The government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and

b. The average rate of that incidental taking by vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or

c. The particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

The President has delegated to the Secretary of State the authority to make certifications pursuant to Section 609 (Memorandum of December 19, 1990; 56 FR 357; January 4, 1991).

The relevant species of sea turtles are: Loggerhead (Caretta caretta), Kemp's ridley (Lepidochelys kempi), green

(Chelonia mydas), leatherback (Dermochelys coriacea) and hawksbill (Eretmochelys imbricata).

B. Summary of Comments Received and Responses to Those Comments

The Department of State received 11 sets of comments on the Federal Register notice issued March 25, 1999. The Department received 5 sets of comments from governments (or government agencies): Agriculture, Fisheries and Forestry Australia;India; Malaysia; Thailand; and the U.S. Fish and Wildlife Service. The Department also received 6 sets of comments from non-governmental organizations and individuals: A coalition of environmental organizations, including the Caribbean Conservation Corporation, Center for Marine Conservation, Consumers Choice Council, Defenders of Wildlife, Earthjustice Legal Defense Fund, Humane Society of the United States, National Wildlife Federation, Natural Resources Defense Council, Sea Turtle Restoration Project, Sierra Club, World Wildlife Fund; Australian Prawn Promotion Association; Center for Marine Conservation; National Fisheries Institute; Sea Turtle Restoration Project; and J. Frazier, D. PhIL.

The Federal Register notice issued March 25, 1999 presented a review of the WTO decision and the steps being proposed and/or taken by the United States to implement that decision. However, the notice sought public comments on those aspects of the WTO decision that were intended to be addressed through the proposed changes to the guidelines, as set forth in Sections II and III of that notice.

Section II of the notice proposed an amendment to the list of exemptions for methods of harvesting shrimp that do not pose a threat to sea turtles and are thus outside the scope of any embargo under the Section 609. Section II also described in more specific terms the types of information that foreign governments may provide and the manner in which the Department will review such information in making determinations under Section 609.

Section III of the notice proposed certain changes to the criteria that the Department will use in making certification decisions, with the intent of introducing greater flexibility in considering the comparability of foreign programs and the U.S. program. Section III also laid out an elaborated "timetable and procedures" for certification decisions, including an expedited timetable to apply in 1999 only. The intent of these proposed changes is to increase the transparency and predictability of the certification process and to afford foreign governments seeking certification a greater degree of due process.

The governments and organizations that submitted comments did not limit those comments to Sections II and III of the Federal Register notice. Instead, many of those comments responded to other parts of the notice, particularly to the current policy of permitting importation of shrimp harvested by vessels equipped with turtle excluder devices ("TEDs") in uncertified nations, for which the Department proposed no change.

The following material summarizes, and responds to, all comments received.

(1) General Comments: A number of comments received were general in nature and did not relate to any particular proposal for revision of the guidelines. Several comments simply praised the effort of the Department of State to comply with the WTO ruling. Three comments, however, took the position that, in order to comply with the WTO decision, the United States must lift the import prohibition required by Section 609 immediately and that mere revisions in the implementation of Section 609 are insufficient.

Response. The WTO decision did not require a change to Section 609 itself or require that the import prohibitions set forth in Section 609 be otherwise lifted across-the-board. Rather, the WTO decision found that several aspects of the implementation of Section 609, in their cumulative effect, amounted to a violation of the obligations of the United

States under the WTO Agreement. The modifications to the guidelines set forth in this notice, together with the other measures described in the Federal Register notice issued March 25, 1999, are intended to address the rulings and *36947 recommendations set forth in the WTO decision.

(2) Comments on Section II: With respect to the proposed amendment to the list of exemptions for harvesting methods that do not harm sea turtles, one comment simply supported the new wording. Another comment suggested that the conditions and criteria upon which determinations will be made under the proposed amendment should be clearly identified and that there should be a definite time-frame regarding publication and notification of the results of such determinations.

Response. The proposed amendment is designed to cover situations not presently known to the Department of State in which shrimp may be harvested in ways that do not adversely affect sea turtle species. As such, it is difficult to specify the conditions and criteria upon which such determinations will be made. Instead, in keeping with the spirit of the WTO decision, the intent is to provide for the flexibility necessary to assess each situation on its own merits, taking into account differences that may exist in the shrimp harvesting conditions in different nations. For similar reasons, it is hard to specify a single time-frame that would be appropriate for all such determinations. Nevertheless, the section of the proposed guidelines entitled "Review of Information" provides that the Department of State will make such determinations within 120 days from the date on which a foreign government submits the necessary information.

A final comment suggested that the term "incidental mortality" should be used instead of "incidental capture."

Response. The proposed guidelines actually use the term "incidental taking," which covers both incidental mortality and incidental capture. In the view of the Department of State, the term "incidental taking" is the most

appropriate term since, in addition to being the term used in Section 609 itself, it is well-established in U.S. law and practice regarding the protection of endangered and threatened sea turtles.

Several comments supported the proposed changes regarding review of information, particularly the new language requiring "empirical data supported by objective scientific studies" and the proposed timeline for response. Once comment suggested the deletion of the phrase "available biological and commercial data," on grounds that such data are not relevant to the determination of whether the fishing environment of a harvesting nation is likely to pose a threat to sea turtles.

Response. The term "available biological and commercial data" refers to two separate sets of information. "Biological data" refers, e.g., to data and information on the resources in question, both the shrimp that is being targeted by the fisheries and the sea turtles that might be caught incidental to those fisheries. "Commercial data" refers, in this case, to information relating to the operation of the fleet in a particular fishery (areas of operation, fishing depth, length of trawls, etc.). Both sets of information are relevant to determining of whether the fishing environment in a particular country or fishery is likely to pose a threat to sea turtles. To be clearer on this point, the final version of the guidelines replaces the term "biological and commercial data" with "biological data regarding the resources in question and operational information relating to activities of the fishing fleet".

(3) Comments on Section III: With respect to the proposed changes intended to introduce greater flexibility in the making of certification decisions, several comments supported the changes on grounds that they would encourage nations to adopt innovative methods for protecting sea turtles. Another comment emphasized that, because properly installed TEDs release 97 percent of sea turtles captured in

shrimp trawl nets, other approaches to protecting sea turtles in the course of shrimp trawl fishing cannot be considered comparable unless they are 97 percent effective.

Response: As recognized in the WTO decision, Section 609 requires, as a condition for certification, that a foreign program for protecting sea turtles in the course of shrimp trawl fishing be comparable to the U.S. program. If a foreign nation adopts a program that seeks to protect sea turtles by modifications to the gear used for shrimp trawling, it may be appropriate to compare, in a numerical sense, the success of such gear modifications in protecting sea turtles to the success achieved through the mandatory use of TEDs. If, by contrast, a foreign nation seeks to protect sea turtles from the effects of shrimp trawl harvesting through other means, e.g., through time and area closures or other non-gear related measures, it may not be appropriate to make the comparison to the U.S. program on a strictly numerical basis.

A further comment argued that the criteria on which certifications are made should be more clearly identified. Certain elements should be more clearly defined, including "comparably effective regulatory program", "sufficient duration" and "information from other sources".

Response: The term "comparably effective regulatory program" derives its meaning from Section 609 itself; i.e., "a regulatory program governing the incidental taking of sea turtles in the course of commercial shrimp trawl harvesting that is comparable to that of the United States." By contrast, the term "sufficient duration" is difficult to specify precisely, due to the fact that the duration of a scientific study necessary to make a reliable determination may vary considerably, depending on the nature of the inquiry. As provided in the section of the guidelines entitled "Review of Information," the United States will, upon request "review and provide comments on a planned or existing study with respect to sample size, scientific methodology and other factors that affect whether such a study provides a sufficient

basis for making a reliable determination." It is the intention of the Department of State to work cooperatively with foreign nations seeking certification in considering the scientific bases on which such determinations are to be made.

Finally, the section of the guidelines entitled "Review of Information" also makes clear that the term "information from other sources" includes, but is not limited to "academic and scientific organizations, intergovernmental organizations and non-governmental organizations with recognized expertise in the subject matter."

The same comment added that the proposed revisions have not sufficiently taken into account the issue of predictability.

Response: The Department of State is not certain what is meant by this comment. To the extent that the comment suggests the need for a foreign government seeking certification to anticipate the result of a determination before it is made, the section of the guidelines entitled "Timetable and Procedures for Certification Decisions" provides, inter alia, for the considerable information exchange that is intended to allow the foreign government to predict the likely result. In particular, the guidelines stipulate that, "By March 15, the Department of State will notify in writing through diplomatic channels the government of each nation that, on the basis of available information * * * does not appear to qualify for certification. Such notification will explain the reasons for this preliminary assessment, suggest steps that the government of the harvesting nation can take in order to receive a certification and invite the government of the harvesting nation to provide, by April *36948 15, any further information. If the government of the harvesting nation so requests, the Department of State will schedule face-to- face meetings between relevant U.S. officials and officials of the harvesting nation to discuss the situation." Through these procedures, the Department of State intends

that the certification determinations will be both more predictable and transparent.

With one exception, all other comments that addressed the proposals for new timetables and procedures supported the proposals, on grounds that they would ensure transparency and equitableness and will improve predictability, due process and procedural fairness. However, one comment stated that the proposed date of September 1, 1999, by which foreign governments seeking certifications under the revised guidelines must submit information, is not acceptable due to such factors as the availability of resources, capacity, skills, technologies, etc.

Response: The Department of State recognizes that a government seeking certification on the basis of the revised guidelines may not, by September 1, 1999, be able to gather sufficient information necessary to support such a request. To meet this concern, and in accordance with its existing practice, the Department will accept requests for certification at any time in the year and will undertake to process them as expeditiously as possible. However, the Department can only commit to making a certification determination by December 6, 1999 if it has received the necessary information by September 1, 1999. Language to this effect has been added to the guidelines.

(3) Comments on Other Issues. Despite the fact that the Federal Register notice issued March 25, 1999 only sought comments on the issued discussed above, by far the most comments pertained to the policy of the Department of State relating to the importation of shrimp harvested by vessels equipped with TEDs in uncertified nations. The current policy was set forth in the guidelines issued by the Department of State on August 28, 1998, Public Notice 2876, 63 F.R. 167 ("the current policy").

In general, some comments actively supported the current policy, while other comments strongly opposed it. Those comments in support of the current policy argued that

imports of shrimp caught by vessels equipped with TEDs should not be excluded from the U.S. market, regardless of the certification status of the nation involved. Allowing such shrimp into the United States encourages foreign shrimpers to join sea turtle conservation efforts. Another comment in support of the current policy emphasized that, if shrimp is harvested by a vessel using a TED, it should be allowed to enter the U.S. market whether or not all vessels in the same nation are using TEDs.

Comments in opposition to the current policy argued that the policy was inconsistent with Section 609, insofar as Section 609 provides for certification of foreign nations, and does not allow for the authorization of individual shipments of shrimp entering the United States. Other comments also took the view that the current policy undermines the goal of sea turtle conservation by creating a disincentive for foreign nations that are maintaining, or may be considering, a nation-wide program to require TEDs use. Still other comments stated that the use of TEDs by only some vessels in a foreign nation does not protect sea turtles overall, in that sea turtles that escape from nets equipped with TEDs are subject to capture and drowning in nets of other vessels that are not using TEDs.

Response. The Department of State recognizes the strongly held views on all sides of this issue, and notes that the issue is also the subject of on-going litigation before the U.S. Court of International Trade. In light of these circumstances, the Department has determined that it will make no change to the current policy at this time.

Several comments supported U.S. efforts, described in the Federal Register notice issued March 25, 1999, to pursue negotiations toward a comprehensive sea turtle agreement for the Indian Ocean region. One comment, however, noted such an agreement "should not include a WTO escape clause, because this will negate the chance of any pro-environment aspect of the treaty to survive if ever challenged."

Response. The Department of State is not certain what is meant by the term "WTO escape clause." The Department would simply note that the agreement we envision would deal with the protection of sea turtles and would not deal with international trade issues except to reinforce existing restrictions on international trade in sea turtles and sea turtle parts.

Several comments addressed issues concerning the provision of assistance by the United States Government to other governments to promote TEDs use. One comment urged the United States Government to offer assistance to other governments in developing effective monitoring and enforcement programs. Another comment suggested that the United States Government should give TEDs away for free or on a subsidized basis, and that U.S. shrimp fishermen could take part in training shrimp fishermen in other nations.

Response. The United States Government, primarily through the NMFS, has offered assistance to other governments in the area of monitoring and enforcing fishing rules, and shrimp fishing rules in particular. We envision that, under the auspices of the Inter-American Sea Turtle Convention and a comparable agreement that would cover the Indian Ocean region, such assistance could also be made available from a variety of sources.

Experience has shown that foreign governments can easily acquire TEDs on the open market or by constructing TEDs themselves from materials that are readily available. The costs of purchasing or constructing a TED is modest when compared with other costs associated with the operation of a commercial shrimp trawl vessel, such as fuel, gear, etc. In our judgment, the resources of the United States Government are better devoted to training foreign government officials and shrimp fishermen in the proper design, construction, installation and use of TEDs.

The Department of State would support initiatives by U.S. fishermen familiar with TEDs to assist their foreign counterparts in acquiring and using this technology.

Several comments addressed other exemptions pertaining to shrimp harvested in ways not harmful to sea turtles. One comment noted that the ecological effects of shrimp farming or aquaculture ultimately harm sea turtles as they do other marine life. Another comment characterized as "meaningless and arbitrary" the 30-day minimum that shrimp must spend in an aquaculture pond before being harvested in order to qualify for the aquaculture exemption. A final comment suggested a more precise definition for the term "mechanical devices" with respect to the exemption relating to artisanal means of shrimp harvesting.

Response. While the Department of State is aware of significant ecological concerns with respect to the harvesting of shrimp by aquaculture, those concerns do not relate to sea turtles specifically. As such, the Department is of the view that Congress did not intend to include the harvesting of shrimp by aquaculture within the meaning of the term "commercial fishing technology that may adversely affect" sea turtle species. Regarding the 30-day minimum period, the Department instituted this requirement to ensure that shrimp categorized as qualifying for the *36949 aquaculture exemption were not actually harvested in the wild and merely placed in an aquaculture facility for a brief moment before being processed for export. With respect to the term "mechanical devices," the Department has modified the language of the guidelines to add specificity.

Another comment suggested that the DSP-121 forms be made available for public inspection.

Response. The Department of State does not believe that this suggestion is feasible, or that its adoption is necessary to achieve an adequate system for monitoring imports of shrimp.

The guidelines contain numerous safeguards to ensure the proper completion of the DSP-121 and to protect against fraud.

A final comment suggested that, to achieve effective sea turtle conservation, the guidelines should cover all species of sea turtles, despite the fact that Section 609 applies only to "those species of sea turtles the conservation of which is the subject of regulations promulgated by the Secretary of Commerce on June 29, 1987."

Response. The purpose of the guidelines is to assist in the implementation of Section 609, which, as a technical matter, pertains only to those species of sea turtles covered by the June 29, 1987 regulations promulgated by the Secretary of Commerce. However, the Department of State notes that, as a practical matter, the requirements relating to shrimp imports set in place by Section 609 and the guidelines have the effect of extending protection to all endangered and threatened species of sea turtles. There are few, if any, places in the world where endangered or threatened sea turtle species falling outside the technical scope of Section occur and that sea turtle species covered by Section 609 do not.

Revised Guidelines

For the sake of clarity, the August 28, 1998 guidelines are restated below as modified to reflect the changes proposed in the Federal Register notice issued March 25, 1999, and the comments received on those proposed changes.

I. Introductory Material

A. The U.S. Program

Since certification decisions under Section 609(b)(2)(A) and (B) are based on comparability with the U.S. program governing the incidental taking of sea turtles in the course of shrimp harvesting, an explanation of the components of that program follows. The U.S. program requires that commercial shrimp trawl vessels use TEDs approved in accordance with standards established by the U.S. National

Marine Fisheries Service (NMFS), in areas and at times when there is a likelihood of intercepting sea turtles. The goal of this program is to protect sea turtle populations from further decline by reducing the incidental mortality of sea turtles in commercial shrimp trawl operations.

The commercial shrimp trawl fisheries in the United States in which there is a likelihood of intercepting sea turtles occur in the temperate waters of the Gulf of Mexico and the Atlantic Ocean from North Carolina to Texas. With very limited exceptions, all U.S. commercial shrimp trawl vessels operating in these waters must use approved TEDs at all times and in all areas. The only exceptions to this requirement are as follows:

a. Vessels equipped exclusively with wing nets, skimmer trawls, and pusher- head trawls when used in conjunction with certain restricted tow times are not required to use TEDs because their operations do not pose a threat to sea turtles. Vessels equipped with barred beam trawls and/or barred roller trawls are not required to use TEDs. Single try nets (with less than a twelve foot headrope and fifteen foot rope) are not required to use TEDs.

b. Vessels whose nets are retrieved exclusively by manual rather than mechanical means are not required to use TEDs because the lack of a mechanical retrieval system necessarily limits tow times to a short duration so as not to pose a threat of the incidental drowning of sea turtles. This exemption applies only to vessels that have no power or mechanical-advantage trawl retrieval system.

c. In exceptional circumstances, where NMFS determines that the use of TEDs would be impracticable because of special environmental conditions such as the presence of algae, seaweed, or debris, or that TEDs would be ineffective in protecting sea turtles in particular areas, vessels are permitted to restrict tow times instead of using TEDs. Such exceptions are generally limited to two periods of 30

days each. In practice, NMFS has permitted such exceptions only rarely.

With these limited exceptions, all other commercial shrimp trawl vessels operating in waters subject to U.S. jurisdiction in which there is a likelihood of intercepting sea turtles must use TEDs at all times. For more information on the U.S. program governing the incidental taking of sea turtles in the course of commercial shrimp trawl harvesting, see 50 CFR 227.17 and 50 CFR 227.72(e).

B. Shrimp Harvested in a Manner Not Harmful to Sea Turtles

The Department of State has determined that the import prohibitions imposed pursuant to Section 609 do not apply to shrimp or products of shrimp harvested under the following conditions, since such harvesting does not adversely affect sea turtle species:

a. Shrimp harvested in an aquaculture facility in which the shrimp spend at least 30 days in pond prior to being harvested.

b. Shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States.

c. Shrimp harvested exclusively by means that do not involve the retrieval of fishing nets by mechanical devices, such as winches, pulleys, power blocks or other devices providing mechanical advantage, or by vessels using gear that, in accordance with the U.S. program described above, would not require TEDs.

d. Shrimp harvested in any other manner or under any other circumstances that the Department of State may determine, following consultation with the NMFS, does not pose a threat of the incidental taking of sea turtles. The Department of State shall publish any such determinations in the Federal Register and shall notify affected foreign governments and other interested parties directly.

C. Shrimp Exporter's/Importer's Declaration

The requirement that all shipments of shrimp and products of shrimp imported into the United States must be accompanied by a declaration (DSP-121, revised) became effective as of May 1, 1996 and remains effective. The DSP-121 attests that the shrimp accompanying the declaration was harvested either under conditions that do not adversely affect sea turtles (as defined above) or in waters subject to the jurisdiction of a nation currently certified pursuant to Section 609. All declarations must be signed by the exporter. The declaration must accompany the shipment through all stages of the export process, including any transformation of the original product and any shipment through any intermediary nation. As before, the Department of State will make copies of the declaration readily available. Local reproduction of the declarations is fully acceptable.

The requirement that a government official of the harvesting nation not *36950 currently certified pursuant to Section 609 must also sign the DSP-121 asserting that the accompanying shrimp was harvested under conditions that do not adversely affect sea turtles species remains effective. In order to protect against fraud, the Department will continue to conduct periodic reviews of the systems that such foreign governments have put in place to verify the statements made on the DSP-121 form.

Date of Export. Import prohibitions shall not apply to shipments of shrimp and products of shrimp with a date of export falling at a time in which the harvesting nation is currently certified pursuant to Section 609.

Country of Origin. For purposes of implementing Section 609, the country of origin shall be deemed to be the nation in whose waters the shrimp is harvested, whether or not the harvesting vessel is flying the flag of another nation.

E. Review of Information

The government of any harvesting nation may request that the Department of State review any information

regarding the particular shrimp fishing environment and conditions in that nation, or within a distinct geographic region of that nation, in making decisions pursuant to Section 609. Such information may be presented to demonstrate, inter alia:

(1) That some portion of the shrimp intended to be exported from that nation to the United States is harvested under one of the conditions identified above as not adversely affecting species of sea turtles;

(2) That the government of that nation has adopted a regulatory program governing the incidental taking of sea turtles in the course of commercial shrimp trawl fishing that is comparable to the U.S. program and, therefore, that the nation is eligible for certification under Section 609(b)(2)(A) and (B); or

(3) That the fishing environment in that nation does not pose a threat of the incidental taking of sea turtles and, therefore, that the nation is eligible for certification under Section 609(b)(2)(C).

Such information should be based on empirical data supported by objective scientific studies of sufficient duration and scope to provide the information necessary for a reliable determination. In addition, information submitted to support a request for any such determination should include available biological data regarding the resources in question and operational information relating to the activities of the fishing fleet that are relevant to determining whether or not the fishing environment of the harvesting nation is likely to pose a threat to sea turtles. Studies intended to show the rate of incidental taking of sea turtles in a given shrimp fishery should, at a minimum, contain data for an entire fishing season. Upon request, the United States will review and provide comments on a planned or existing study with respect to sample size, scientific methodology and other factors that affect whether such a study provides a sufficient basis for making a reliable determination.

The Department will fully review and take into consideration all such information and, in consultation with the NMFS, respond in writing to the government of the harvesting nation within 120 days from the date on which the information is received.

The Department, in consultation with the NMFS, will also take into consideration information on the same subjects that may be available from other sources, including but not limited to academic and scientific organizations, intergovernmental organizations and non-governmental organizations with recognized expertise in the subject matter.

II. Guidelines for Making Certification Decisions

A. Certification Pursuant to Section 609(b)(2)(C)

Section 609(b)(2)(C) authorizes the Department of State to certify a harvesting nation if the particular fishing environment of the harvesting nation does not pose a threat of incidental taking of sea turtles in the course of commercial shrimp trawl harvesting. Accordingly, the Department shall certify any harvesting nation meeting the following criteria without the need for action on the part of the government of the harvesting nation:

a. Any harvesting nation without any of the relevant species of sea turtles occurring in waters subject to its jurisdiction;

b. Any harvesting nation that harvests shrimp exclusively by means that do not pose a threat to sea turtles, e.g., any nation that harvests shrimp exclusively by artisanal means;

c. Any nation whose commercial shrimp trawling operations take place exclusively in waters subject to its jurisdiction in which sea turtles do not occur.

B. Certification Pursuant to Section 609(b)(2)(A) and (B)

Under Section 609(b)(2), the Department of State shall certify any other harvesting nation by May 1st of each year if

"the government of (that) nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States" and if "the average rate of that incidental taking by vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting."

a. Regulatory Program. The Department of State shall assess regulatory programs, as described in any documentary evidence provided by the governments of harvesting nations, for comparability with the U.S. program.

Where standard otter trawl nets are used in shrimp fisheries in waters where sea turtles are present, sea turtles will inevitably be captured and drowned. The Department of State is presently aware of no measure or series of measures that can minimize the capture and drowning of sea turtles in such nets that is comparable in effectiveness to the required use of TEDs.

1. If the government of the harvesting nation seeks certification on the basis of having adopted a TEDs program, certification shall be made if a program includes the following:

(i) Required Use of TEDs--a requirement that all commercial shrimp trawl vessels operating in waters in which there is a likelihood of intercepting sea turtles use TEDs at all times. TEDs must be comparable in effectiveness to those used in the United States. Any exceptions to this requirement must be comparable to those of the U.S. program described above; and

(ii) Enforcement--a credible enforcement effort that includes monitoring for compliance and appropriate sanctions.

2. If the government of a harvesting nation demonstrates that it has implemented and is enforcing a comparably effective regulatory program to protect sea turtles in the

course of shrimp trawl fishing without the use of TEDs, that nation will also be eligible for certification. As described above, such a demonstration would need to be based on empirical data supported by objective scientific studies of sufficient duration and scope to provide the information necessary for a reliable determination. In reviewing any such information, the Department of State will take fully into account any demonstrated differences between the shrimp fishing conditions in the United States and those in other nations, as well as information available from other sources. *36951

b. Incidental Take. Average incidental take rates will be deemed comparable if the harvesting nation requires the use of TEDs in a manner comparable to that of the U.S. program or, as described above, otherwise demonstrates that it has implemented a comparably effective program to protect sea turtles in the course of shrimp trawl fishing without the use of TEDs.

c. Additional Considerations. 1. Form--A regulatory program may be in the form of regulations promulgated by the government of the harvesting nation and having the force of law. If the legal system and industry structure of the harvesting nation permit voluntary arrangements between government and the fishing industry, such an arrangement may be acceptable so long as there is a governmental mechanism to monitor compliance with the arrangement and to impose penalties for non-compliance, and reliable confirmation that the fishing industry is complying with the arrangement.

2. Documentary Evidence--Documentary evidence may be in the form of copies of the relevant laws, regulations or decrees. If the regulatory program is in the form of a government-industry arrangement, then a copy of the arrangement is required. Harvesting nations are encouraged to provide, to the extent practicable, information relating to the extent of shrimp harvested by means of aquaculture.

3. Additional Sea Turtle Protection Measures--The Department of State recognizes that sea turtles require protection throughout their life cycle, not only when they are threatened during the course of commercial shrimp trawl harvesting. In making certification determinations, the Department shall also take fully into account other measures the harvesting nation undertakes to protect sea turtles, including national programs to protect nesting beaches and other habitat, prohibitions on the directed take of sea turtles, national enforcement and compliance programs, and participation in any international agreement for the protection and conservation of sea turtles. In assessing any information provided by the governments of harvesting nations in this respect, the Department of State will rely on the technical expertise of NMFS and, where appropriate, the US Fish and Wildlife Service to evaluate threats to sea turtles and the effectiveness of sea turtle protection programs.

4. Consultations--The Department of State will engage in ongoing consultations with the governments of harvesting nations. The Department recognizes that, as sea turtle protection programs develop, additional information will be gained about the interaction between sea turtle populations and shrimp fisheries.

These Guidelines may be revised in the future to take into consideration that and other information, as well as to take into account changes in the U.S. program. These Guidelines may also be revised as a result of pending domestic litigation. In addition, the Department will continue to welcome public input on the best ways to implement both these Guidelines and Section 609 as a whole and may revise these guidelines in the future accordingly.

C. Timetable and Procedures for Certification Decisions

Each year the Department will consider for certification: (a) any nation that is currently certified, and (b) any other shrimp harvesting nation whose government requests such certification in a written communication to the Department of

State through diplomatic channels prior to September 1 of the preceding year. Any such communication should include any information not previously provided that would support the request for certification, including the information specified above under Review of Information.

Between September 1 and March 1, U.S. officials will seek to visit those nations requesting certifications pursuant to Section 609(b)(2)(A) and (B). Each visit will conclude with a meeting between the U.S. officials and government officials of the harvesting nation to discuss the results of the visit and to review any identified deficiencies regarding the harvesting nation's program to protect sea turtles in the course of shrimp trawl fishing.

By March 15, the Department of State will notify in writing through diplomatic channels the government of each nation that, on the basis of available information, including information gathered during such visits, does not appear to qualify for certification. Such notification will explain the reasons for this preliminary assessment, suggest steps that the government of the harvesting nation can take in order to receive a certification and invite the government of the harvesting nation to provide, by April 15, any further information. If the government of the harvesting nation so requests, the Department of State will schedule face-to-face meetings between relevant U.S. officials and officials of the harvesting nation to discuss the situation.

Between March 15 and May 1, the Department of State will actively consider any additional information that the government of the harvesting nation believes should be considered by the Department in making its determination concerning certification.

By May 1 of each year the Department of State will make formal decisions on certification. The governments of all nations that have requested certification will be notified in writing of the decision promptly through diplomatic channels. In the case of those nations for which certification

is denied, such notification will again state the reasons for such denial and the steps necessary to receive a certification in the future.

The government of any nation that is denied a certification by May 1 may, at any time thereafter, request reconsideration of that decision. When the United States receives information from that government demonstrating that the circumstances that led to the denial of the certification have been corrected, U.S. officials will visit the exporting nation as early as a visit can be arranged. If the visit demonstrates that the circumstances that led to the denial of the certification have indeed been corrected, the United States will certify that nation immediately thereafter.

D. Special Timetable for 1999

The United States and the four nations that brought the WTO complaint have agreed that the United States would implement the recommendations and rulings of the DSB within 13 months of the adoption of the WTO Appellate Body report by the DSB, i.e., by December 6, 1999.

Accordingly, the Department of State hereby establishes the following timetable to apply in 1999 only:

> After the date of publication of the revised guidelines, the government of any harvesting nation that was denied certification by May 1, 1999, may request to be certified in accordance with these guidelines in a written communication to the Department of State through diplomatic channels prior to September 1, 1999.
>
> Not later than October 15, 1999, U.S. officials will seek to visit to those nations requesting such certifications. Each visit will conclude with a meeting between the U.S. officials and government officials of the harvesting nation to discuss the results of the visit and to review any identified deficiencies regarding the harvesting nation's

program to protect sea turtles in the course of shrimp trawl fishing.

By November 1, 1999, the Department of State will notify in writing through diplomatic channels the government of any nation that, on the basis of available *36952 information, including information gathered during such visits, does not appear to qualify for certification. Such notification will explain the reasons for this preliminary assessment, suggest steps that the government of the harvesting nation can take in order to receive a certification and invite the government of the harvesting nation to provide, by November 15, 1999, any further information.

Between November 15 and December 6, 1999, the Department of State will actively consider any additional information that the government of the harvesting nation believes should be considered by the Department in making its determination concerning certification.

By December 6, 1999, the Department of State will make formal decisions on certification. The governments of all nations that have requested certification under the special 1999 timetable will be notified in writing of the decision promptly through diplomatic channels. In the case of those nations for which certification is denied, such notification will again state the reasons for such denial and the steps necessary to receive a certification in the future.

The government of any nation that is denied a certification by December 6, 1999, may, at any time thereafter, request reconsideration of that decision. When the United States receives information from that government demonstrating that the circumstances that led to the denial of the certification have been corrected, U.S. officials will visit the exporting nation as early as a visit can be arranged. If the

visit demonstrates that the circumstances that led to the denial of the certification have indeed been corrected, the United States will certify that nation immediately thereafter.

The Department of State recognizes that a government seeking certification on the basis of the revised guidelines may not, by September 1, 1999, be able to gather sufficient information necessary to support such a request. To meet this concern, and in accordance with its existing practice, the Department will accept requests for certification at any time in 1999 and will process them as expeditiously as possible. However, the Department can only commit to making a certification determination by December 6, 1999 if it has received the necessary information by September 1, 1999.

E. Related Determinations

As noted above, any harvesting nation that is not certified on May 1 of any year may be certified prior to the following May 1 at such time as the harvesting nation meets the criteria necessary for certification. Conversely, any harvesting nation that is certified on May 1 of any year may have its certification revoked prior to the following May 1 at such time as the harvesting nation no longer meets those criteria.

As a matter relating to the foreign affairs function, these guidelines are exempt from the notice, comment, and delayed effectiveness provisions of the Administrative Procedures Act. This action is exempt from Executive Order 12866, and is not subject to the requirements of the Regulatory Flexibility Act.

Dated: June 29, 1999.

Stuart E. Eizenstat,
Under Secretary of State for Economic, Business and Agriculture Affairs.

[FR Doc. 99-17330 Filed 7-7-99; 8:45 am]

BILLING CODE 4710-09-U

APPENDIX J

THE URUGUAY ROUND AGREEMENTS ACT

STATEMENT OF ADMINISTRATIVE ACTION

This Statement of Administrative Action is submitted to the Congress in compliance with section 1103 of the Omnibus Trade and Competitiveness Act of 1988 (1988 Act) and accompanies the implementing bill for the Agreement Establishing the World Trade Agreement and the agreements annexed to that Agreement (the Uruguay Round agreements). The bill approves and makes statutory changes required or appropriate to implement the Uruguay Round agreements, which the United States Trade Representative (Trade Representative) signed on April 15, 1994, on behalf of the United States under the authority of section 1102 of the 1988 Act.

This Statement describes significant administrative actions proposed to implement the Uruguay Round agreements. In addition, incorporated into this Statement are two other statements required under section 1103: (1) an explanation of how the implementing bill and proposed administrative action will change or affect existing law; and (2) a statement setting forth the reasons why the implementing bill and proposed administrative action are necessary or appropriate to carry out the Uruguay Round agreements.

As is the case with earlier Statements of Administrative Action submitted to the Congress in connection with fast-track trade bills, this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of U.S. International obligations and domestic law. Furthermore, the Administration understands that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this

Statement. Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements, the interpretations of those agreements included in this Statement carry particular authority.

For ease of reference, this Statement generally follows the organization of the Uruguay Round agreements. The Statement begins with the Agreement Establishing the World Trade Organization, addresses in order each multilateral agreement contained in annexes 1 and 2 of that Agreement, and, finally, addresses the two "plurilateral" agreements that the United States will join when in enters the WTO.

In each case, the Statement first briefly summarizes the most important provisions of the particular agreement. Next, the Statement describes the pertinent provisions of the implementing bill, explaining how the bill changes or affects existing law and stating why those provisions are required or appropriate to implement the agreement. Finally, the Statement describes the administrative action proposed to implement the particular agreement, explaining how the proposed action changes existing administrative practice and stating why the changes are required or appropriate to implement the agreement.

* * * *

Trade Representative will give particular attention in the report to those countries and practices that have been the subject of public submissions over the prior year raising specify intellectual property issues.

2. Administrative Action

a. Panel Reports and U.S. Sovereignty

Over the past several decades, the United States has invoked GATT dispute settlement procedures to challenge actions by other governments more frequently than any other country. U.S. laws and practices have also been the subject of GATT challenges. Although the United States has

prevailed in the vast majority of disputes in which it has been involved, there have been instances in which panels have found U.S. practices to be inconsistent with the GATT.

Reports issued by panels or the Appellate Body under the DSU have no binding effect under the law of the United States and do not represent an expression of U.S. foreign or trade policy. They are no different in this respect than those issued by GATT panels since 1947. If a report recommends that the United States change federal law to bring it into conformity with a Uruguay Round agreement, it is for the Congress to decide whether any such change will be made.

Furthermore, neither federal agencies nor state governments are bound by any finding or recommendation included in such reports. In particular, panel reports do not provide legal authority for federal agencies to change their regulations or procedures or refuse to enforce particular laws or regulations, such as those related to human, animal or plant health, or the environment. In addition, as noted elsewhere in this Statement, the United States will not seek to introduce a panel report into evidence in any civil suit brought by the United States challenging a state law or regulation on the ground that it is inconsistent with a Uruguay Round agreement.

In normal circumstances where a panel report finds a U.S. law or practice to be inconsistent with a Uruguay Round agreement, the United States will agree with the other parties to the dispute on a resolution of the dispute that is in conformity with the panel or Appellate Body recommendations. Where the matter involves a law or regulation of a state of the United States, any resolution would be reached in consultation and coordination with the state concerned, as described in this Statement in connection with the WTO Agreement.

The DSU recognizes that it may not be possible for a government to agree to the removal of a measure that a panel has found to be inconsistent with a Uruguay Round

agreement. Accordingly, it provides for alternative resolutions, including the provision of trade compensation and other negotiated settlements, or the suspension of benefits equivalent to the "nullification or impairment" of benefits caused by the offending measure. In all uses following a panel report, the DSU leaves to the discretion of the United States any change in federal or state law and the manner in which any such change may be implemented whether through the adoption of legislation, a change in regulation, judicial action, or otherwise.

b. Enforcement of U.S. Rights

During the Uruguay Round negotiations, U.S. negotiators took pains to ensure that U.S. laws dealing with foreign unfair trade practices, including section 301 of the Trade Act of 1974, would remain fully effective. Since it was enacted, section 301 has been the principal U.S. statute for addressing foreign unfair practices that adversely affect U.S. exports of goods and services. Section 301 authorizes the Trade Representative to take action, subject to the direction of the President, against acts, policies, or practices that are inconsistent with, or deny benefits under, trade agreements or that are unreasonable, unjustifiable, or discriminatory and burden or restrict U.S. commerce.

Since 1974, the Congress has amended section 301 several times to strengthen it and ensure that it covers the full range of foreign barriers affecting U.S. exports. In 1979, following the negotiation of a number of new GATT codes in the Tokyo Round, Congress amended section 301 to ensure that it would be used to enforce U.S. rights under trade agreements and to respond to practices that deny U.S. benefits under such agreements.

In 1984, Congress made clear that section 301 can be used to address foreign unfair practices affecting U.S. services trade, foreign investments, and intellectual property rights, and that the Administration can respond to such practices by applying sanctions against services from the

country in question. In 1988, the Congress enacted a number of amendments to section 301 to strengthen its procedures still further, including the addition of provisions covering worker rights and toleration of anticompetitive practices. These changes have helped to make section 301 an increasingly effective tool in opening foreign markets.

The Administration intends to use section 301 to pursue vigorously foreign unfair trade barriers that violate U.S. rights or deny benefits to the United States under the Uruguay Round agreements. The Administration equally intends to use section 301 to pursue foreign unfair trade barriers that are not covered by those agreements. This is what Congress intended in the Omnibus Trade and Competition Act of 1988 when, on the one hand, it made a more effective and expeditious dispute settlement mechanism the first principal U.S. negotiating objective and, on the other hand, the Congress made major modifications to strengthen section 301 for use against both those practices falling within and outside trade agreements to which the United States is a party.

The Administration expects that as a result of the Uruguay Round agreements in general, and the Dispute Settlement Understanding in particular, section 301 will be even more effective than it has been in the past in addressing foreign unfair trade barriers.